In the Supreme Court of the United States

OCTOBER TERM, 19[redacted]

No. [redacted]

JOHN W. MARTIN, JR., SECRETARY OF STATE FOR DELAWARE COUNTY, STATE OF ELAINE, ET AL.,

APPELLANTS,

v.

PEAK REFINING AND [illegible] COMPANY, ET AL.,

APPELLEES.

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Supreme Court of the United States

OCTOBER TERM, 1914.
No. 318.

JOHN W. RAST, TAX COLLECTOR FOR DUVAL COUNTY, STATE OF FLORIDA, ET AL., APPELLANTS,

vs.

VAN DEMAN AND LEWIS COMPANY, ET AL., APPELLEES.

Appeal from the District Court of the United States for the Southern District of Florida.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This cause is brought before this Court by appeal from the orders of the District Court of the United States for the Southern District of Florida granting an interlocutory injunction in said cause and overruling and denying the motion of Defendants below to dismiss said suit. (Record pages 44, 45, 53.) This was a suit in Equity, brought in said District Court by the Appellees against the Appellants. For convenience and brevity we shall hereafter in this brief, in discussing the proceedings in the Court below, refer to the Appellees as the Complainants, and to the Appellants as the Defendants, according to their status in the District Court, excepting where there may be special occasion to speak of them as the Appellants and Appellees in this Court. References to pages of the record in

this brief will be to the top numbering or number of pages of the printed record, unless the contrary is specified.

The facts of the case are fully set out and alleged in the Bill of Complaint, which also specifies the relief prayed, and prays such further and other relief as may be requisite in the premises, and such facts alleged in the bill and the relief prayed are hereinafter mentioned or referred to, as far as may be necessary in this brief, in the discussion of the various features of the case; and propositions of law involved; hence, for the sake of brevity, we shall not undertake to restate the contents of the Bill of Complaint in detail in this preliminary statement of the case, but pray that the bill be referred to for the details thereof. The Bill of Complaint prays in substance that the Defendants Tax Collectors, the Defendants State Attorneys, the Defendants County Solicitors and the Defendants Prosecuting Attorneys be restrained and enjoined from collecting or attempting to collect from said Complainants or any of them, or from any person, firm or corporation, similarly situated, the license taxes, or any of them, or any part thereof, mentioned or provided for in Section 35 of Chapter 6421 of the Laws of Florida, approved June 5, 1913, for or because or on account of offering, giving, selling or delivering with merchandise or using any coupons, slips, certificates or other evidences of indebtedness or liability, or like device or token. Also that said provisions of said Statute may be declared and decreed to be unconstitutional, illegal and void, and that Complainants and each of them may have such further and other relief in the premises as to equity may pertain and to the Court seem meet.

Bill of Complaint, Record 5-25.

MATTERS AND QUESTIONS INVOLVED IN THE SUIT.

The principal questions involved in this suit and which come before this Court on appeal are three. Although there are other material questions properly to be considered by the Court, yet, as above stated, there are three principal questions which may be stated as follows:

1. Have the United States Courts jurisdiction to enjoin State Officers from enforcing the collection of license taxes by

summary levies upon property and by criminal proceedings under a Statute of the State which violates the Constitution of the United States, and where the business interests and property rights of the Complainants will be seriously affected and injured, without adequate remedy at law, as stated in the Bill? We submit that it has been clearly, fully and finally decided by this Court that the United States Courts have such jurisdiction.

2. Do the provisions of the Florida Statute violate the fourteenth amendment to the Constitution of the United States? Under this general question there are three subdivisions to be considered, as there are three general methods of doing the business involved in Florida. They are:

First: Where the Florida merchant issues his own coupon, certificate or cash register receipt and himself makes payment or redemption of the same, sometimes by the delivery of some valuable article of merchandise, sometimes by the payment of cash or allowance of credit on account of purchase, being in the nature of a discount, or for or on account of a certain amount having been purchased of the merchant by the customer. Bill of Complaint, Par. IV, Record page 10. As to the cases or business covered under this head, we submit, that the Court will find under all authorities and decisions, as well as in the reason of the thing and the established principles of constitutional law, that the said Statute violates the Constitution of the United States; and it may be added that it violates the Constitution of the State of Florida. It may be noted here that this provision of the Statute, which, according to all the authorities, is unconstitutional, is the only provision that applies to intrastate commerce, and that the other provisions of the Statute are unconstitutional both because they violate the fourteenth amendment to the Constitution of the United States and also because they are in violation of the commerce clause of the Constitution of the United States, as noted hereafter.

Second: The second class of dealings according to the method of doing business covered by said Statute is that where the manufacturer or shipper outside of the State of Florida in some other State of the Union, inserts such coupons or certificates in packages of his goods which he ships to Florida, and the ultimate purchaser or consumer takes such coupons or cer-

tificates from such packages and returns them to such manufacturer or shipper in such State outside of Florida, who gives a premium for them or redeems them and sends such premium or proceeds of redemption to such ultimate purchaser or consumer in Florida who has forwarded to him such coupons or certificates. Bill of Complaint, paragraph III, Record pages 7-10. This also is the case of a person issuing his own coupons, or certificates, or giving discounts redeemable or payable by himself, and is, in substance, and principle, the same as the case stated in the first subdivision above, where the Florida merchant issues coupons or certificates redeemable or payable by himself, and under all the authorities the provisions of said Florida Statute as to this second class of cases or method of doing business is clearly unconstitutional, being in violation of the Constitution of the United States and of the State of Florida.

Third: The third class of dealings covered by said Statute is where the manufacturer or shipper in a State other than the State of Florida inserts in the packages of his goods which he ships to Florida such coupons or certificates, which are taken from the packages by the ultimate purchaser or consumer in Florida and sent to some company or agency in some State of the United States outside of the State of Florida other than the manufacturer or shipper of the goods, to be redeemed or paid and the premium or proceeds thereof is returned by such company or agency to the person in Florida who has sent such coupons or certificates. Bill of Complaint, paragraph III, Record pages 7-10. This class of cases or method of doing business differs from the two preceding classes in that a premium company or agency other than the manufacturer or shipper himself, is used for the redemption or payment of the coupons or certificates. This transaction may bear some resemblance to the dealing through or with a redemption company or trading stamp company as to which some two or three cases decided in the United States have held that Statutes embodying such license or prohibiting such transactions are constitutional. But these two or three cases are opposed to the whole current of authority upon the subject and to very numerous decisions of the State Courts and the Federal Courts. We submit that the Court will find said two or three decisions above mentioned not only very weak in numbers but weak in

reasoning, and that upon reason, as well as upon the overwhelming weight of authority, said Florida Statute as to this class of cases also is unconstitutional.

3. Does said statute violate the interstate commerce clause of the Constitution of the United States?

THE LICENSE TAX PROVISIONS OF STATUTE COMPLAINED OF.

The license tax provisions of the Statute complained of are contained in Section 35 of Chapter 6421 of the Laws of the State of Florida, entitled, "An Act Imposing Licenses and Other Taxes, Providing for the Payment Thereof and Prescribing Penalties for Doing Business Without a License, or Other Failure to Comply With the Provisions Thereof," which act was approved by the Governor of said State June 5th, 1913. By said Section of said Statute there is a license tax imposed upon merchants, druggists and storekeepers generally. In addition to such regular license taxes every person, firm or corporation, who shall offer with merchandise bargained or sold any coupon, profit-sharing certificates, etc., redeemable in premiums, is required to pay annually a State license tax of $500.00, and a county license tax of $250.00, in each and every county in which said business is conducted or carried on and like amounts of taxes for each place of business, and is required to pay like amounts of additional license taxes where any such coupons, etc., shall be offered with merchandise bargained or sold, redeemable by any other person, firm or corporation for each other person, firm or corporation who may redeem the same; and it is expressly stated that the license taxes prescribed in said Section shall be in addition to other licenses prescribed in the Act. It is further provided in said Section that merchants using trading stamps shall pay a license tax of $250.00 for each place of business where they use such stamps.

Said Section of said Statute reads as follows:

"Section 35. Merchants, Druggists and Storekeepers shall pay a license tax as follows:

"For the first one thousand ($1,000.00) dollars or fraction of one thousand dollars of stock of merchandise, three ($3.00) dollars in each county and for each place of business, and one and one-half ($1.50) dollars for each additional thousand or fraction thereof; but dealers in merchandise at wholesale only, shall pay a license tax of one and one-half ($1.50) dollars for each one thousand ($1,000.00) dollars of their stock of merchandise. Provided, That the words 'stock of merchandise' shall be held to mean the cash value of the merchandise or goods on hand and not the amount of capital stock invested in the business; Provided further, That any merchant keeping sewing machines in stock for sale in the same manner as other merchandise shall not be taxed as a sewing machine agent or dealer.

"Provided further, That each and every person, firm or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a State license tax of five hundred ($500.00) dollars and a county license tax of two hundred and fifty ($250.00) dollars in each and every county in which said business is conducted or carried on, and if more than one place of such business shall be operated by any person, firm or corporation, a separate State and county license shall be taken out for each such place; and no person, firm or corporation shall offer with merchandise bargained or sold as aforesaid, any coupon, profit-sharing certificates or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation than the one offering the same without paying the above license for each other person, firm or corporation who may redeem the same. The license prescribed in this Section shall be in addition to other licenses prescribed by this Act. Any person violating any of the provisions in this Section, whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand ($1,000.00) dollars or by imprisonment in the county jail not exceeding six months.

"Mercantile Agencies: Shall pay a license tax of one hundred ($100.00) dollars in each county in which an office is established.

"Merchants using trading stamps shall pay a license tax of two hundred and fifty ($250.00) dollars for each place of business where they use such stamps.

"Merchant tailors shall pay a license tax of ten ($10.00) dollars for each place of business."

Bill of Complaint, paragraph XI, Record pages 12, 13.

Acts of the Legislature of the State of Florida, Regular Session, 1913, Volume I, pages 35, 36.

THE IMPOSITION OF A LICENSE TAX ON TRADING STAMP COMPANIES IS NOT INVOLVED IN THIS CASE.

It is to be noted that this Bill of Complaint is brought by certain Florida merchants on behalf of themselves and the many other merchants of Florida in like situation to enjoin the collection of license tax from such merchants for offering any coupon, profit-sharing certificates, etc., as hereinbefore mentioned and specified in the Bill of Complaint. This case does not involve any question as to whether or not the State has the right to impose a license tax on a trading stamp company or person or firm for doing business in the State. There is such a license tax imposed in another Section of the Florida Statute. The trading stamp business, whether conducted by a person, firm or a corporation generally known as a trading stamp company, consists in substance of the trading stamp concern's furnishing such stamps to merchants with lists of premiums, which premiums are held by the trading stamp concern and a trading stamp concern practically selling such stamps to the merchants who deliver them to their customers with goods purchased by their customers, and the trading stamp concern delivering the premiums to the customers upon the presentation of the stamps, such premiums being selected by the cus-

tomers from lists furnished. As above stated, this case does not involve the license tax on that business, but only involves the license tax imposed upon the Florida merchant for issuing and redeeming, himself, coupons, profit-sharing certificates or the like, or his selling and delivering goods of manufacturers and producers from out of the State of Florida, which have such coupons or certificates inserted in or attached to the packages of goods.

The provision of the Florida Statute for a license tax on the business of trading stamp companies is in an entirely different section from the section of the Statute involved in this suit. Said Section concerning the license tax on such trading stamp business is as follows:

> "Sec. 55. Trading Stamp Firms: Persons or firms or corporations known as trading stamp companies, shall pay a State license tax of one thousand ($1,000.00) dollars in each county where they transact any business."
>
> Chapter 6421, Statutes of Florida, Acts of 1913, page 51.

HEARING AND ORDER FOR INTERLOCUTORY INJUNCTION.

Said case was heard at Huntsville, Alabama, on September 18th, 1913, before the Honorable David D. Shelby, Circuit Judge, and the Honorable W. R. Sheppard, District Judge for the Northern District of Florida, and the Honorable Rhydon M. Call, District Judge for the Southern District of Florida, in accordance with Section 266 of the Statutes of the United States approved March 3rd, 1911, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," known as "The Judicial Code." The application for an interlocutory injunction was based upon the allegations of the Bill of Complaint and the affidavits thereto attached, duly sworn to by several different affiants representing and acting for the Complainants. The Defendants filed a motion to dismiss the suit. Record pages 33 and 34. Said interlocutory injunction was granted and said motion to dismiss said suit was overruled. Record pages 44, 45.

ARGUMENT.

THERE WAS NO ERROR IN THE ORDERS APPEALED FROM.

The appeal of Appellants, as has been before stated, is from the orders of the Court below granting the interlocutory injunction and denying the motion to dismiss the Bill of Complaint. The grounds upon which Appellants contend that the Court below erred are the same as to the granting of the interlocutory order and as to the overruling of the motion to dismiss. They are stated in the motion to dismiss. Record pages 33 and 34. They amount, in substance, to two grounds: first, that the Court has not jurisdiction to enjoin and restrain the Defendants who are officers of the State of Florida from the performance of the duties imposed upon them by the Statute in question; second, that there is no equity in the bill. We submit that this Court will find upon examination and consideration of the matter that the Court below did have jurisdiction, that the Bill of Complaint did state a case for equitable relief, and that the interlocutory injunction was properly granted.

The opinion in said case delivered by Judge Call is, we submit, a very clear and convincing statement of the facts and the law.

See printed record pages 38-44. 214 Fed. R., 827.

IMPORTANCE OF THIS CASE AND THE PRINCIPLES INVOLVED THEREIN.

This case is one of much importance in the matters which are immediately involved in the decision that may be rendered therein, involving as it does immediately the right of a great number of Florida merchants to do business according to established methods and to handle and sell many articles of merchandise from which they would be precluded by the enforcement of the Statute complained of, and involving also the

right of manufacturers, producers and shippers of merchandise all over the United States to ship their goods into Florida and to sell and dispose of them and do the business in the manner which has been long established and which they deem advantageous; but the case is of vastly more importance in the necessary application of principles of constitutional law for the protection of rights of property and of personal liberty guaranteed to citizens by the Constitution of the United States. There may have been a time in this country when the Courts were disposed to be too narrow in declaring restrictions upon the powers of Legislatures claimed to be exercised for the welfare of communities or of the State, but, if so, there certainly exists no such condition now. The recognition by the Courts of the broad powers of the Legislatures, under the police power and the power of taxation, to regulate, restrain and prohibit, is certainly not now circumscribed by any narrow boundaries or limitations. Changes in conditions in this country, the great growth of population, new conditions of business and of living, a vast immigration of people, comparatively ignorant, without anything of the American spirit, character or capabilities, have all tended to make a wider exercise of such governmental powers necessary, but we submit that as far as may be possible American institutions, the American spirit and the rights of the individual should be preserved. There is no danger now of the powers of Legislatures being too circumscribed, the danger is that the rights of the individual to property and to liberty, including the control and transaction of his own affairs and business in his own way, provided it does not violate or endanger the public peace, morals, health or welfare, will be arbitrarily and unnecessarily and unjustly restrained or taken away. Every tendency or movement for progress or development or the public welfare has to be carefully guarded or else it will be used and abused by those who seek to pervert it to their own selfish and unjust ends. The greatest peril in this country is in the constant efforts of individuals and classes to inject into legislation provisions to deprive some persons of rights or opportunities in order to give undue advantages to others. Where legislation, so brought about or tending to such ends, is enacted, the greatest obligation now existing upon the Courts and the function wherein they can render the greatest service is in protecting the people from such legislation where it is prohibited by the Constitution of the United

States or of the State. While the Courts should be and are very careful not to attempt to substitute their ideas of policy or expediency for those of the Legislature, yet upon the other hand, they can not, without abandoning the highest duty which they owe to the people and to the country, refuse or avoid the exercise of the power and the duty to declare unconstitutional statutes which unduly infringe upon the rights of the individual or which under pretense of taxation or regulation or prohibition are really arbitrary and unjustifiable. This case, as we have said, is one which in itself involves the right to do a vast amount of business as it has been done, and concerning matters which afford no ground for legislative restraint or prohibition, but beyond that it involves the question of whether the Legislature is practically beyond any restraint of the Constitution of the United States or of the State in interfering with, restraining or destroying the business and property of the individual. When, in the great case of Munn vs. Illinois, the Supreme Court of the United States declared the principles of law upon which have been based, or which have sustained, a mass of remedial legislation providing for the regulation of railroad corporations and others transacting business of such a public nature as to bring them within that decision, the opinion of the Court was very broad in its language and there was at first a general impression throughout the country that it had been held therein that there was no power in the Courts to protect rights of property that might be involved in such cases from destruction or confiscation, but that such legislation was wholly within the arbitrary discretion of the Legislatures, and that the only appeal for redress was to the ballot-box. Very soon it became apparent that if such were the law all property rights involved might be and probably would be confiscated or destroyed and there followed a series of decisions by this Court limiting the legislative power and protecting the rights of property with the result that we have had built up a system of law recognizing legislative power within proper limits and protecting individual rights. Under the recent decisions of the Court the powers of the Legislatures have been amply recognized and declared. The pendulum has swung fully as far as it ought to go in that direction and what is necessary now is the recognition and declaration of the other side of the law for the protection of the individual so that American insti-

tutions and American liberty may not be utterly lost and destroyed, and the American citizen may not be abandoned and delivered up deprived of the protection of law and his constitutional rights to the arbitrary, unconsidered and partial action of Legislatures. There is no means by which such arbitrary and unjust legislation and legislation enacted in the interests of some particular individuals or classes can be more readily brought about than under the guise of license taxes. Consider this Florida statute in question. There are fifty-six pages containing almost innumerable provisions imposing license taxes. How easy it was to slip any particular provision into such a statute for the selfish purpose of some individual seeking to gain an advantage over some business competitors without any public demand and without any public reason or necessity, without notice and without consideration for the public welfare, may be readily perceived. Unless the citizen is protected in his constitutional rights by the Courts against such legislation, he is without any protection whatever.

THIS COURT HAS JURISDICTION OF THE SUBJECT MATTER OF THE BILL OF COMPLAINT, OF THE PARTIES, AND TO GRANT THE RELIEF PRAYED.

PARTIES.

The suit is brought by the Complainants on behalf of themselves and others similarly situated, who have a general interest in the subject of the action and in obtaining the relief demanded or prayed herein and to whom the questions involved herein are of general interest, and who constitute a class so numerous as to make it impracticable to bring them all before the Court. Record page 3.

This is specifically authorized in such a case by the new rules of practice for the Courts of Equity of the United States promulgated by the Supreme Court of the United States.

Rules of Practice for Courts of Equity. Rule 38.

Little, et al., vs. W. V. Tanner, as Attorney General of the State of Washington, et al. 208 Fed. R., 605.

The suit is brought against the Tax Collectors of the several counties of the State of Florida and against the prosecuting

officers, to-wit: the State Attorneys, County Solicitors and Prosecuting Attorneys for the several Judicial Circuits and Counties of the State of Florida. In order for Complainants to obtain any complete or adequate relief in the premises it was necessary to make all of said Officers of said State parties defendant. Some of them are inhabitants of the Southern District of Florida and some of them are inhabitants of the Northern District of Florida, as shown in the Bill of Complaint, but both of said districts being in the same State and the suit not being of a local nature, said suit against all of said Defendants is expressly authorized and provided for by Sections 52 and 53 of the Judicial Code; and it is further provided by said sections that all mesne and final process which, according to the decisions and authorities, includes all orders and decrees in the cause, may be served and executed in any or all the divisions of the district in which the suit is brought and in any and all districts contained in the State.

Judicial Code, Sections 52 and 53.

FEDERAL QUESTIONS.

The Bill of Complaint involves several Federal questions, as it sets forth that the act of the Legislature of the State of Florida, complained of, is in a number of particulars in violation of the Constitution of the United States, to-wit: in violation of the commerce clause of the Constitution; in violation of the Fourteenth Amendment to the Constitution; in violation of Section 10 of Article 1 of the Constitution which provides that no State shall pass any law impairing the obligation of contracts; and in violation of the second clause of Article 6 of the Constitution of the United States which declares that the Constitution and laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, inasmuch as said Florida statute conflicts with certain statutes of the United States mentioned in the Bill of Complaint and hereinafter referred to. Consequently this Court has jurisdiction of the subject matter of the cause without regard to the citizenship of the parties. See paragraphs XIV, XV and XVI of the Bill of Complaint.

Printed Record pages 15-20.

VALUES IN CONTROVERSY.

The Bill of Complaint also shows that the matter in controversy in this suit as to each of said complainants exceeds the sum or value of three thousand dollars, exclusive of interest or costs. See paragraphs XII, XX, XXI and XXII of the Bill of Complaint.

Printed Record pages 13-15, 20-23.

ALLEGATIONS OF BILL SHOWING JURISDICTION AND RIGHT OF COMPLAINANTS TO RELIEF IN EQUITY.

The Bill of Complaint further shows not only that the provisions of Section 35 of Chapter 6421 of the Laws of the State of Florida, approved June 5th, 1913, and in the Bill of Complaint particularly set forth, are in violation of the Constitution of the United States upon the facts and the grounds specified in the bill, but, also, that the penalties, fines and imprisonments provided in said section of said statute for the enforcement thereof, are so onerous, drastic and excessive and numerous as to deter Complainants from going on doing business in the premises as they have heretofore done, and testing the validity of said statute and the provisions thereof in a Court of law; and that the Defendant Tax Collectors are threatening to and will immediately proceed to collect said license taxes from each of Complainants and from all other persons in like situation, and in order to do so will seize and sell their property and will enter upon their stores and warehouses and will interrupt and interfere with their businesses and will seize their stocks of wares, goods and merchandise, and will cause each of them loss of business, trade and customers, and will sell such property at forced sales and at sacrifices, and will greatly injure and damage the property and the business of each of Complainants, and of such other persons, and will not only cause loss and damage to each of them by reason of seizing and taking their property, but will also, on account of the peculiar character and uses of the property, to-wit: their stocks of merchandise wherewith and whereby they exercise, carry on and maintain their businesses and occupations, and

because of the repeated and numerous seizures and sales of such property that will be made by such Defendant Tax Collectors, and such a multiplicity of litigation would be inflicted on and caused to each of said Complainants, and such other persons, and their businesses and occupations would be so interrupted, damaged and destroyed and such tremendous amounts of moneys, costs and expenses would be collected out of them or their property seized and sold therefor, and the damages resulting would be so difficult or impossible of ascertainment and computation that they have no adequate remedy at law in the premises. It is further alleged that said Defendant State Attorneys, County Solicitors and Prosecuting Attorneys are threatening to prosecute Complainants under said section of said Statute of the State of Florida and that such prosecutions will affect the property and property rights of each of said Complainants and prevent them from enjoying, using or disposing of their property or transacting their business, as in the bill set forth, and will greatly lessen the value of their property and will prevent them from disposing of much property now in their possession, as in the bill set forth, and will prevent them from acquiring and disposing of like property in the future, and will prevent them from carrying out their contracts or representations in connection with property already sold or disposed of, as in the bill set forth; and that the threatened actions and proceedings of each of said Prosecuting Officers and each of said Tax Collectors will have all of said consequences and effects; and Complainants and other persons in like situation will be frequently and constantly arrested, restrained and deprived of their liberty and prosecuted in the Courts of said State by or under the authority and action of said Defendant Prosecuting Officers, and the Complainants and other persons in like situation have no adequate action or remedy in the premises at law and can only obtain suitable or adequate relief in a Court of Equity. See Bill of Complaint, paragraphs XII, XIV, XXI and XXII.

Printed Record pages 13-15, 15-19, 21-23.

THE JURISDICTION AND RIGHT TO RELIEF ARE FULLY ESTABLISHED BY DECISIONS OF SUPREME COURT OF THE UNITED STATES.

It is thoroughly settled by the decisions of the Supreme Court of the United States and of the other Federal Courts that in such a case as is stated by the Bill of Complaint in this cause the Courts of the United States have full jurisdiction and will, as Courts of Equity, grant such relief as is prayed in said bill by injunction and by declaring and decreeing such a statute as that complained of herein to be unconstitutional, illegal and void and will grant such other equitable relief as may be requisite or appropriate in the premises; that the Federal Courts will so enjoin State officers and that such a suit against State officers for such relief is not a suit against the State and not prohibited by the provision of the Federal Constitution, providing that the judicial power of the United States shall not be construed to extend to any suit against a State such as is mentioned in the Eleventh Amendment of the Constitution of the United States; and that the Federal Courts will in such a case enjoin any officers from so interfering with the business and property rights of complainants under such an unconstitutional Statute, whether such interference shall be by civil or criminal proceedings.

Ex-Parte Young, 209 U. S., 123; 52 Law Ed., 714.

The principles and propositions above stated have been declared and decided in numerous cases in the Federal Courts and we shall cite as many of them as time and space will permit, but really, we submit that we need not go any further than the citation of the above case of Ex-Parte Young and the statement of the question involved and of the answer thereto in the language in which they are stated by the Supreme Court of the United States, as follows, the question being stated thus:

"The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal Court of Equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investi-

gation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings."

Ex-Parte Young, 209 U. S., 149; 52 Law Ed., 724-725.

And the answer being stated by the Supreme Court of the United States thus:

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action."

Ex-Parte Young, 209 U. S., 155-156; 52 Law Ed., 727.

In the still later case of Western Union Telegraph Co. vs. Andrews, et al., the Supreme Court of the United States again declared and enforced in a case very analogous to the present case the doctrine and principle that a United States Court in Equity has jurisdiction to enjoin prosecuting attorneys of a State from taking action in the courts of the State, under the authority of a State statute alleged to violate the Constitution of the United States to recover penalties fixed by that act for violations of its provisions requiring the payment of certain fees in order for complainant to do business in the State. The Bill of Complaint was filed against the prosecuting attorneys of the 17 Judicial Circuits of the State of Arkansas to enjoin them from instituting actions against the Western Union Telegraph Company to recover the penalties for one thousand dollars ($1,000) for each alleged violation of the act. It was averred in the bill that the defendant prosecuting attorneys

would, unless restrained by order of the Court, institute numerous actions as they had threatened to do for the recovery of the penalties aforesaid. Demurrer to the bill was sustained in the United States Circuit Court for the Eastern District of Arkansas and the case was dismissed upon the ground that it was, in effect, a suit against the State of Arkansas. The Supreme Court of the United States affirmed said case of Ex-Parte Young and repeated a part of its language and declared the law to be settled accordingly. The Supreme Court said:

> "This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose. The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of Ex-Parte Young, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed, and the cause remanded for further proceedings."
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> Western Union Telegraph Company vs. P. R. Andrews, et al., 216 U. S., 165, 166, 167; 54 L. Ed., 430, 431.

At the same term of the Supreme Court of the United States, namely, October term, 1909, there was another decision, to-wit: in case of Ludwig vs. Western Union Telegraph Company, fully declaring and sustaining the jurisdiction of the United States Courts in Equity to retain such a Bill of Complaint as the bill in this case and to grant such relief as is prayed in this bill, and deciding both that such a suit is not a suit against the State, and also that such a bill states a case of equity jurisdiction and that it is a proper case for relief in equity by injunction, as prayed in said last mentioned case. The suit as stated by the Supreme Court of the United States was as follows:

"The Western Union Telegraph Company, a corporation of New York, doing business, both interstate and intrastate, in Arkansas, as it had done for many years, brought this suit against O. C. Ludwig, Secretary of State of Arkansas, for the purpose of obtaining a decree that the statute of that State of May 13th, 1907, entitled, 'An Act to Permit Foreign Corporations to Do Business in Arkansas, and Fixing Fees to Be Paid by All Corporations,' Acts of Arkansas, 1907, p. 744, was unconstitutional, null, and void, and enjoining the defendant, in his official capacity, from attempting to revoke, or proclaiming through official newspaper publications that he had revoked, the authority of the plaintiff to do business in Arkansas, or that it had no right to continue doing business in that State. The plaintiff, in its bill, asked such other and further relief as the case might require and as might seem just."

A temporary injunction was issued, afterwards an amended bill was filed and the case was heard in the Court below on demurrer to the bill.

"The demurrer was on these grounds: That the Court was without jurisdiction to hear and determine the case, 'the same being, in effect, a suit against the State' by a citizen of another State, to prevent the enforcement of one of its criminal or penal statutes; that the facts stated in the bill are not sufficient to constitute a cause of action nor to warrant the relief asked; and that the bill was wholly without equity."

The demurrer was overruled and the defendant having elected not to plead further the injunction previously granted was made perpetual and from that order the appeal was prosecuted to the Supreme Court of the United States. The Supreme Court held, citing said case of Western Union Telegraph Company vs. Andrews, that said suit against the secretary of State to enjoin him, as aforesaid, was not a suit against the State prohibited by the Constitution. The Supreme Court then goes on and considers the grounds of unconstitutionality

of the Arkansas statute and the case is a very valuable one as bearing upon several of the points involved in our case, and said decision of the Supreme Court entirely disposes of and overrules all the grounds of objection made by the defendants or their counsel, the Attorney General of the State of Florida, to the jurisdiction of the Court or its power to grant the relief prayed, or as to complainants being entitled to such relief. The Supreme Court not only held that it was not a suit against the State, but that such a case is a case of equity jurisdiction and a proper case for the granting of injunction by the United States Court against the defendant State officers.

The Supreme Court says:

"What has been said is sufficient for the determination of the present case, and we do not at this time go further than is indicated in this opinion. Suffice it to say that the defendant threatens to issue, in his official capacity, and publish, in the newspapers, a proclamation to the effect—no matter upon what specific grounds—that the telegraph company is not authorized, but is forbidden, under penalty, by the laws of Arkansas, from continuing to do local business in that State. Such a proclamation, the Court, as well as everyone else, must know, would not only produce confusion in and irreparable damage to the company's business in Arkansas, but would, in effect, declare that the company is not only subject to a prescribed penalty of $1,000 for continuing to do local business in Arkansas, but is forbidden to make any contract whatever in that State that is enforceable in law or equity. In order to prevent the contemplated or threatened injury to the company, the Court below properly made a decree perpetually enjoining the appellant, as secretary of State, his agents and attorneys, from making proclamation that the telegraph company has no authority to continue doing business in Arkansas."

Ludwig, Secretary of State of Arkansas, vs. Western Union Telegraph Company, 216 U. S., 146, 152, 164; 54 L. Ed., 423, 425, 430.

"It is well settled that, where property rights will be

destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a Court of Equity. Davis & F. Mfg. Co. vs. Los Angeles, 189 U. S., 207-218; 47 L. Ed., 778-780; 23 Sup. Ct. Rep., 498, and cases therein cited."

Dobbins vs. Los Angeles, 195 U. S., 223, 243; 49 L. Ed., 169, 177.

The jurisdiction has been recently again declared and maintained by this Court in the following case:

Home Telephone & Telegraph Co. vs. Los Angeles, 227 U. S., 278; 57 L. Ed., 510.

The jurisdiction is now treated by this Court as too well established to require argument.

"The conclusion just stated leaves us only the duty of separately and briefly referring to some of the propositions pressed in argument: (a) the contention that because the object of the suit was to enjoin State officers from violating the constitutional rights of the complainant, it was therefore a suit against the State, and not maintainable, is so plainly in conflict with the settled doctrine to the contrary that we do not further notice it."

Benjamin F. Harrison, Secretary of the State of Oklahoma, Appt., vs. St. Louis & San Francisco Railroad Company, decided Feb. 24, 1914, Vol. 34 Sup. Ct. Rep., pages 333, 336.

The fact that many persons are affected by the matters involved in a suit and that unless the rights are determined and decreed by a Court of Equity numerous suits will probably arise out of the matters and questions involved is of itself a sufficient ground of equity jurisdiction and a sufficient ground of granting relief by injunction.

City of Cleveland vs. Cleveland City Railway Co., 194 U. S., 517; 48 L. Ed., 1102.
Mills vs. City of Chicago, 127 Fed., 732; Head Note 4.

In the case of Raymond vs. Chicago Union Traction Company the Supreme Court of the United States held that assessing for taxes the franchise and other property of certain corporations at a different rate and by a different method from that employed as to other corporations of the same class for the same year, which resulted in great disparity and discrimination, denied the due process of law and equal protection of the laws protected by the Fourteenth Amendment to the Constitution of the United States, and that the State statute was unconstitutional; also that there was equity jurisdiction to enjoin the defendant officers of the State of Illinois from any proceedings to collect such taxes under such unconstitutional provisions of the statute of the State; that there was such equity jurisdiction, both because the statute affected not only one individual but a large class of individuals or corporations, and also that Complainant was not required to pay the taxes under protest and to institute suit to recover them back from the State officers or from the city of Chicago or the county of Cook or the taxing bodies.

"We are also of opinion that the case is one over which equity has jurisdiction. In Cummings vs. Merchants' National Bank, 101 U. S., 153; 25 L. Ed., 903, this Court held that the case was one properly brought in equity. It was to restrain the collection of a tax. While the Court held that the position of the bank as trustee entitled it to maintain an action in equity and also under the statute of Ohio, it was further held (page 157): 'Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power.' We

have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the Appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind."

Raymond vs. Chicago Union Traction Company, 207 U. S., 20, 37, 38; 52 L. Ed., 78, 88.

"Equity has jurisdiction of a suit to enjoin the enforcement of an invalid ordinance fixing the price to be charged by a gas company to consumers, where they are numerous and the ordinance imposes a penalty for each violation, on the ground of preventing a multiplicity of suits."

Mills vs. City of Chicago, 127 Fed. Rep., 731, 732.

"Where a bill to enjoin enforcement of an alleged illegal municipal smoke ordinance, providing a fine for each separate violation, alleged that it was filed on behalf of complainant and all others similarly situated, and charged that not only was complainant harassed by a multiplicity of suits, but that more suits were threatened by defendant city for violation of the ordinance; that there were a large number of manufacturing plants in the city of Chicago similarly situated with Complainant, and similarly affected; that the ordinance was void, and that a compliance therewith would work irreparable injury and loss of property—a cause of action for equitable relief was presented; and this though a decree restraining further prosecutions under the ordinance would incidentally interfere with criminal proceedings in the State Courts."

Glucose Refining Co. vs. City of Chicago, 138 Fed. Rep., 209.

"A bill by a telephone company to enjoin the enforce-

ment of a city ordinance fixing a maximum rate of charge for telephone service, which alleges the invalidity of the ordinance, and shows that complainant has a large number of contracts with patrons, and that under the provisions of the ordinance it will be subject to prosecution and fine in the case of each one, states a case within equity jurisdiction to prevent a multiplicity of suits."

Ozark-Bell Telephone Co. vs. City of Springfield, Missouri, 140 Fed. Rep., 666.

"(3) Persons against whom an unlawful exaction in the form of a tax is sought to be made may unite in an application for an injunction to restrain the collection of the tax, and are not compelled to pay the same, and brings separate suits against the tax officer for damages."

Hewin, et al., vs. City of Atlanta, 49 S. E., 765, 121 Ga., 731.

CASES CITED BY COUNSEL FOR APPELLANTS TO SUSTAIN OBJECTION THAT THIS IS A SUIT AGAINST THE STATE.

Counsel for Appellants cites two decisions of this Court, namely, In Re Sawyer, 124 U. S., 200, and Fitts vs. McGhee, 172 U. S., 516, in the attempt to support the contention that United States District Court in Equity has not jurisdiction to grant the injunction prayed or the relief prayed by the Bill of Complaint, because it would enjoin the bringing of criminal prosecutions against Complainants by State officers and would amount to a suit and injunction against the State. Said decisions were rendered prior to the case of Ex-Parte Young, 209 U. S., 155, in which all previous decisions of this Court which were thought by this Court to have sufficient bearing on these questions to require notice, were reviewed and held not to conflict with the decision in that case, which decision fully sustains our Bill of Complaint and the relief prayed therein, as we submit we have heretofore clearly shown to the Court.

If, however, any of the cases cited by the Attorney General do in any way conflict with said case of Ex-Parte Young or

the subsequent decisions of the Supreme Court of the United States heretofore cited in this brief, they are overruled or modified by those decisions. The Attorney General in his argument ignores the ground of equity jurisdiction repeatedly stated by the Supreme Court of the United States with reference to such suits and injunctions, namely that where it is alleged that a State statute is in violation of the Constitution of the United States, and that its enforcement either by civil or criminal proceedings would affect property rights of complainants and their rights under the Constitution in circumstances and upon facts such as are stated in this Bill of Complaint, that complainants have the right to go into a Federal Court and have State officers enjoined from instituting any suits or proceedings, civil or criminal, against defendants by temporary injunction until the question can be finally decided, and by permanent injunction if it should be decided in favor of complainants. The Attorney General states in his argument that there is no power in a Court of Equity to enjoin criminal proceedings unless they are instituted by a party to a suit already pending, and to try the same right that is in issue in that suit. Apart from the fact that he ignores other grounds of equity jurisdiction and for such injunction, the case that he states and admits affords grounds for equity jurisdiction and injunction is precisely our case here which is precisely the same case in that respect as said case of Ex-Parte Young.

We allege in the Bill of Complaint that the statute violates the Constitution of the United States and that the defendants are threatening to enforce and about to enforce it by summary levies on the property, interruption and injury of the business and criminal arrests and prosecutions of complainants. Thereupon the Federal questions are brought into the United States Court and the suit to determine them is pending in this Court and the granting of an interlocutory injunction to prevent levies and prosecution by suit, civil or criminal, by said prosecuting officers while said case is pending in this Court under the showing made by the Bill of Complaint that the defendant may be entitled to the relief prayed upon the final hearing is, we submit, clearly within the jurisdiction of the Court, and that the granting of such interlocutory injunction is practically a matter of course. There was no suit pending in the United States Court when the interlocutory injunction was granted in the

case out of which arose the contempt proceedings in Ex-Parte Young, excepting the suit to enjoin said Young as Attorney General of the State of Minnesota and others from taking any steps to enforce the alleged unconstitutional statute. A preliminary injunction was granted, Attorney General Young violated that preliminary injunction and was held to be in contempt of Court. The case is identical with this case in the substantial ground of jurisdiction. There was no receivership of the railroad or any other case pending in the United States Court to give jurisdiction other than the case brought in which the injunction was granted to test the constitutionality of the State statute.

The case principally relied on by the Attorney General is the case of Fitts vs. McGhee, 172 U. S. 516, 43 L. Ed., 535. This case, however, was fully reviewed in said subsequent case of Ex-Parte Young and it was shown that in said Fitts case the officers sued had no duty whatever whether by any special or general statute or law in connection with the matter complained of and the statute the constitutionality of which was attacked; and the Supreme Court of the United States shows fully and clearly that said Fitts case has no application whatever to our case or to the Young case and shows that where officers of the State are threatening to begin suits or prosecutions to enforce an unconstitutional statute that a United States Court of Equity has full jurisdiction to enjoin them, and that it is not necessary that any duty be imposed upon the officers by the unconstitutional statute itself, but that if they have any duty in the premises under the general laws of the State it is sufficient.

> "In those cases the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statute as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer. The being specially

charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State."

Ex-Parte Young, 209 U. S. 158, 52 L. Ed. 728.

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a State official in attempting, by the use of the name of the State, to enforce a legislative enactment which is void because unconstitutional. If the act which the State Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See Re Ayers, 123 U. S. 507, 31 L. Ed. 230, 8 Sup. Ct. Rep. 164. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a Court of Equity."

Ex-Parte Young, 209 U. S. 159, 160, 52 L. ed. 729.

"A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of State

officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the Courts over the subject-matter. In the case of the interference with property, the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a State official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the State official, instead of directly interfering with tangible property, is about to commence suits which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the Complainants, he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the State is, in reality, no more involved in one case than in the other. The State cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States. See Re Ayers, 123 U. S. 507, 31 L. ed. 230, 8 Sup. Ct. Rep. 164.

"This supreme authority, which arises from the specific provisions of the constitution itself, is nowhere more fully illustrated than in the series of decisions under the Federal habeas corpus statute (753, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 592), in some of which cases persons in the custody of State officers for alleged crimes against the State have been taken from that custody and discharged by a Federal Court or Judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this Court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the State in whose custody the person was found. In some of the cases the writ has been refused as matter of discretion; but in others it has been granted, while the power has been fully recognized in all. * * * It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the State by virtue of service of the writ on the State officer in whose custody he is found is not a suit against the State, and yet service of a writ on the Attorney General,

to prevent his enforcing an unconstitutional enactment of a State legislature, is a suit against the State."

Ex-Parte Young, 209 U. S. 167, 168, 52 L. ed. 732.

CONTENTIONS OF COUNSEL FOR APPELLANTS THAT COMPLAINANTS SHOULD BE REQUIRED TO SEEK A REMEDY IN STATE COURTS ARE WITHOUT FOUNDATION AND CANNOT BE SUSTAINED.

Counsel for Appellants suggests that Complainants should not be granted relief in this Court because if one of them or any person in like situation should be arrested such person could sue out a writ of habeas corpus. This contention also was fully disposed of by the Supreme Court of the United States in said case of Ex-Parte Young. A person whose rights under the Constitution of the United States are being invaded is not obliged to submit to the humiliation, trouble and punishment of being arrested and held in custody by the sheriff or other like officer until he can get release by habeas corpus, or to run the risk of being convicted or fined or imprisoned; nor where a number of persons are interested in a constitutional question is one of them required to act as a victim of arrest and imprisonment to test the constitutionality of a State law; nor would the suing out of one writ of habeas corpus prevent numerous other arrests of one person or the arrests of any other person in like situation or afford any adequate relief or remedy in the premises.

Ex-Parte Young, 209 U. S. 163, 164, 52 L. ed. 730, 731.

Even if it be a fact that a party may have a remedy in a State Court for the threatened violation by State officers of his right protected by the Constitution of the United States, that does not affect his right to sue in a United States Court and get an injunction therein.

Bacon vs. Rutland R. Co., 232 U. S. 134, 138; 58 L. ed. 538, 539.

There hardly seems to have been any contention in the argument of the Attorney General that the United States Court has not jurisdiction, so far as jurisdiction of the parties is concerned, to enjoin the tax collectors, who are expressly vested with power and upon whom is expressly imposed the duty by said statute complained of of collecting said license taxes and making summary seizures of and levies upon the property of Complainants to collect the same; and which levies and seizures the Bill of Complaint alleges will be made of and upon the stock of merchandise of Complainants, interrupting and interfering with their business and causing them loss of business, trade and customers, and the sale of their property at forced sales and sacrifices, and will greatly injure and damage the property and business of each of said Complainants and of such other persons, and will not only cause loss and damage to each of them by reason of seizing and taking their property but will also, on account of the peculiar character and uses of their property, to-wit: their stocks of merchandise, wherewith and whereby they exercise, carry on and maintain their businesses and occupations, and the injury to their businesses and occupations and credit and loss of customers, and because of the repeated and numerous seizures and sales of such property of Complainants and each of them that will be made by such tax collectors to collect such license taxes from them for the State and county for each place of business and in each and every county in which said business is conducted and carried on, and also for such license taxes for each and every other person, firm or corporation by whom any such coupons, certificates or any other evidence of indebtedness or liability offered or sold in connection with any merchandise, as hereinbefore stated, may be redeemable, and such a multiplicity of litigation would be inflicted on and caused to each of said Complainants and such other persons by such proceedings, and the business and occupations, aforesaid, of each of said complainants and such other persons would be so interrupted, damaged and destroyed and such tremendous amounts of money, costs and expenses would be inflicted upon them or collected out of them or their property seized and sold therefor by said defendant tax collectors, as aforesaid, and the damages resulting would be so difficult or impossible of ascertainment

and computation that each of said complainants and such other persons would have no adequate remedy at law, etc.

It may also be noticed in this connection that under the statutes of Florida Complainants or any other persons whose property may be so seized or levied on by a tax collector would have no right to replevy such property and give bond therefor. The statutes of Florida expressly provide that before any writ of replevin shall be issued the plaintiff shall make affidavit stating among other things concerning the property that "the same has not been taken for any tax, assessment or fine levied by virtue of any law of this State."

General Statutes of Florida, Sections 2175, 2176.

It is specifically shown and alleged in the Bill of Complaint that by the statutes of the State of Florida, and more particularly under and by Section 59 of said statute complained of, approved June 5, 1913, the tax collector of each County is authorized and empowered to enforce the payment of all license taxes by the seizure and sale of property, and that the tax collectors are threatening to and will immediately proceed so to do.

See paragraph XXI of the Bill of Complaint. Printed Record 21-22.

It is further alleged and shown in the Bill of Complaint that said defendant States Attorneys, County Solicitors and Prosecuting Attorneys for the several circuits and Counties mentioned are respectively authorized and empowered by the laws of said State of Florida to prosecute any person for any violation of any of said provisions of said Section 35 of said statute of Florida complained of, and are threatening to prosecute divers of the Complainants therefor. That such seizures, sales, arrests and prosecutions will be made, done and instituted and proceeded with if said tax collectors and said prosecuting officers are not enjoined.

See paragraph XXII of said Bill of Complaint. Printed Record pages 22-23.

That such prosecuting officers have such powers and duties of prosecuting such cases.

See General Statutes of Florida, Sections 1779, 3877, 3881, 3893.

Said Sections of said Statutes are as follows:

(The State Attorney—His Powers, Duties and Responsibilities.)

"1779. (1344.) **Before the Court Itself.** It shall be his duty to appear in the Circuit Court within his judicial circuit, and prosecute or defend on behalf of the State all suits, applications or motions, civil or criminal, in which the State is a party."

"3877. (2825.) **Powers and Duties.** The prosecuting attorney of the Criminal Court of Record shall be called the county solicitor, and his powers, duties and obligations shall be the same as those exercised by and imposed upon the State Attorney, except when otherwise provided."

"3881. (2830.) **Method of Prosecution.** All offenses of which said Court has jurisdiction shall be prosecuted upon information filed by the county solicitor under oath, and the same rules of practice and pleading that now obtain as to indictments shall obtain as to informations. All informations shall begin in effect as follows: '(Name of county solicitor) county solicitor for the county of ....., prosecuting for the State of Florida, in the said county, under oath information makes that.....,' and such information shall have appended thereto the oath of the county solicitor to the effect following: 'Personally appeared before me, ... county solicitor, who being first duly sworn says that the allegations, as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true would constitute the offense therein charged,' which affidavit shall be made by the county solicitor before some person qualified to administer an oath."

(Its Prosecuting Attorney.)

"3893. (2836.) **Duties.** He shall prosecute all criminal cases before the County Court, and shall sign all informa-

tions filed in said Court by him, and do and perform all the duties required of a prosecuting officer."

Furthermore by said Statute of Florida June 5, 1913, involved in this suit by Section 59 thereof, it is made the duty of the Tax Collectors and County Judges to report to the State's Attorneys any violation of said act, and by Section 63 thereof it is made the duty of the County Judges to report to the proper Prosecuting Officers of the counties the names of all persons that have procured license, etc., so that it is manifest by the terms of this particular statute that the Prosecuting Officers have the duty imposed upon them of enforcing the payment of these license taxes by prosecutions, as well as the power and duty given and imposed upon them under the General Statutes of the State to prosecute all violations of the State Statutes which are punishable by fine or imprisonment.

Statutes of Florida, 1913, Chapter 6421, Sections 59, 63, p. 54, 55.

Said Sections of said Statute are as follows:

"Sec. 59. Any person or persons, firm or corporations or association that shall carry on or conduct any business or profession for which a license is required, by either this or any other Act, without first obtaining such license, shall, except in cases as are otherwise provided by law, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than double the amount required for such license. The payment of all license taxes shall be enforced by the seizure and sale of the property by the Tax Collector, or in case of State license taxes payable either to the State Treasurer or Comptroller, by the State Treasurer or Comptroller, as the case may be, and it is hereby made the duty of the Tax Collector and County Judge to report to the Comptroller and State's Attorneys any violation of this Act."

"Sec. 63. The County Judge shall report to the grand jury each term of Court, or the Clerk of the Circuit Court when no grand jury is ordered, or to the proper prosecuting

officer in their respective counties, which shall be filed in said Clerk's office, the names of all persons that have procured license under the provisions of this Act. The Comptroller of the State of Florida shall furnish such blanks as are required in book form to the County Judge of each county, who shall receive his receipt therefor, stating the number of blank license in each book received, and the County Judge shall return such books for examination at any time when requested to do so by the Comptroller."

STATEMENTS OF BRIEF FOR APPELLANTS AS TO PROSECUTIONS ARE INCORRECT.

The following statement is made in the brief for Appellants, on page 20:

> "In the instant case there is no suggestion, and there could be none, that those violating the statute would be 'frequently indicted.' All that could be done would be to indict each of them one time. What probably would be done would be to indict one of them one time. In this way the law would be tested and the question settled in the State Courts in the simplest manner and within a very short time."

It would appear in this instance, as in several others in the brief for Appellants, that counsel for Appellants had not carefully read the Bill of Complaint. So far is the statement from being correct that there is no suggestion that those violating the statute would be frequently prosecuted, that on the contrary it is expressly alleged in the Bill of Complaint:

> "* * * and each of said Complainants and persons in like situation will be frequently and constantly arrested, restrained and deprived of their liberty and prosecuted in the Courts of said State by or under the authority and action of said Defendant Prosecuting Officers hereinbefore named."
>
> Bill of Complaint, paragraph 22, Printed Record, pages 22-23.

It is also manifest from the facts alleged in the bill that it would necessarily be the case that there would be frequent prosecutions, arrests, etc., of Complainants and the very numerous other merchants of Florida in like situation. Under the statute each merchant is required to pay these license taxes for every place of business in every county in the State, and also is required to pay such a license tax for every other person whose goods he at any time sells in which, or attached to which, are such coupons or the like. One of the Complainants, Van Deman & Lewis Company, has a place of business in Jacksonville, Duval county, Florida, and another in Miami, in Dade county, Florida; another Complainant, J. S. Pinkussohn Cigar Company, has a place of business in Jacksonville, Duval county, Florida, and also a place of business in Pensacola, Escambia county, Florida, and their officers and employees would be arrested and prosecuted in each of said counties. Also each of the Florida merchants would be arrested and prosecuted or is liable to be arrested and prosecuted every time he makes another sale or delivery of merchandise with a coupon or profit-sharing certificate. Also, no matter how many license taxes he may have paid, every time he gets another kind or brand of goods from another manufacturer or shipper with such coupon or the like inserted therein or attached thereto, he would have to pay another license tax or have his stock of goods seized or be arrested and prosecuted or both, as said officers of the said counties might choose to do. There is no officer in the State of Florida who can give orders to and control said Prosecuting Officers in the performance of their duties as to whom they shall prosecute, or how often they shall prosecute any person. Nor, it may be added, is there any officer in the State of Florida who can control the Tax Collector of each county and order him not to make levies to enforce the payment of license taxes where the statute provides therefor.

Hence, the statements of the brief for Appellants are not only manifestly incorrect as to what the Bill of Complaint states upon this subject, but they are also mistaken as to what could be done and probably would be done as to frequent prosecutions of Complainants and the many other merchants in like situation on whose behalf the Bill of Complaint is brought.

As we have seen, these license taxes would amount to at least fifteen thousand dollars a year for each of these Complain-

ants, for each place of business, and each of the thousands of merchants in the State in like situation, and an additional license tax for each additional article of insert goods of any manufacturer or shipper that they might handle, and each of said Complainants and each such merchants would be liable to be arrested, imprisoned, prosecuted and fined to the amount of one thousand dollars, or imprisoned in the county jail not exceeding six months, for each violation of any provision of said statute concerning said licenses, that is to say, he would be so liable to additional and renewed prosecution, fine and imprisonment every time that he sold or offered an article with such coupons, profit-sharing certificates, etc. We submit that it is manifest that not only have Complainants no adequate remedy at law, but that said statute is unconstitutional upon the ground of imposing such enormous penalties that would prevent parties from testing the same at law. That Complainants have no adequate remedy at law, we submit, is manifest, and that, as is said by this Court in the case of Wadley Southern R. Co. vs. State of Georgia:

> "Of course the right to make a defense, at the risk of having to pay such an enormous penalty, is merely illusory."
> Wadley Southern R. Co. vs. State of Georgia, decided January 11, 1915. Supreme Court Rep., Vol. 35, pages 214, 219.

INJUNCTION AGAINST TAX COLLECTORS WAS PROPER AND NOT ERRONEOUS.

The Bill of Complaint further alleges that the use of such coupons, profit-sharing certificates, etc., induce purchasers to trade more largely with, and make more of their purchases from Complainants, and increases the business of Complainants and their profits from their business, and enables Complainants to carry and sell stocks of goods covering the various articles of merchandise with which such coupons, slips, certificates, etc., are delivered and are of great importance and value to said several Complainants in their said several businesses, and if they are prevented from so using or delivering the same their several businesses will be greatly reduced in the lines of mer-

chandise carried and sold therein and in the amount of business done, and in the receipts and profits, and by the loss of customers, etc., to the amount of many thousands of dollars as to each of them. Also, that each of them has on hand and in their stocks of merchandise large amounts and quantities of such articles which are sold and delivered with such coupons, etc., and if they shall be prevented from selling and delivering such articles with such coupons, etc., each of said Complainants will be subjected to great loss and damage and much hindered, embarrassed and injured in their businesses and the value of their said property on hand will be destroyed or greatly lessened.

Bill of Complaint, paragraph 5, Printed Record, pages 10-11.

It is further alleged in the Bill of Complaint that the said amounts of license taxes are so great that they would take away and destroy all profit in so doing any such business or making any sales, and that they impose financial obligations and burdens so great and require the payment of such sums of money by and from Complainants and all other persons in like situation that they will prohibit and prevent Complainants and all such persons from doing such business and that they are in fact prohibitory.

Bill of Complaint, paragraph 14. Subdivisions F, G and H, Printed Record, pages 17, 18.

It is also alleged in the bill that the penalties, fines and imprisonments provided in said section of said statute are so onerous, drastic, excessive and numerous as to deter Complainants from going on doing business and testing the validity of such statute and the provisions thereof in a Court of law. Also that the fines and penalties imposed by said provisions of said statute are so excessive and exorbitant as to be confiscatory of the property of said Complainants and each of them, were they to continue to carry on their business for the purpose of testing the validity of the same in a Court of law, and should said law be held to be valid.

Bill of Complaint, paragraph 14. Subdivisions L and M, Printed Record, pages 18-19.

The Bill of Complaint further alleges that all of said facts are true as to many other merchants doing business in the State of Florida and being in the same position and condition and having like rights and interests and being subject to like losses, injuries and damages as Complainants, to-wit: as Complainants are informed and believe and so allege, about five thousand merchants of the State of Florida.

Bill of Complaint, paragraph 9, Printed Record, page 12.

Complainants also allege that they and each of them have paid all license taxes due or payable by them respectively to the State of Florida, or any county thereof, for doing and carrying on or entitling them to do or carry on the several businesses of each of them other than the said license taxes concerning any coupons, profit-sharing certificates, etc., in said bill mentioned and complained of.

Bill of Complaint, paragraph 19, Printed Record, page 20.

It is also alleged in the Bill of Complaint that the Defendant Tax Collectors are threatening to and will immediately proceed to collect said license taxes from each of Complainants and from all other persons in like situation, and in order to do so will seize and sell their property and will enter upon their stores and warehouses and will interrupt and interfere with their businesses and will seize their stocks of wares, goods and merchandise, and will cause each of them loss of business, trade and customers, and will sell such property at forced sales and at sacrifices, and will greatly injure and damage the property and the business of each of Complainants, and of such other persons, and will not only cause loss and damage to each of them by reason of seizing and taking their property, but will also, on account of the peculiar character and uses of the property, to-wit: their stocks of merchandise wherewith and whereby they exercise, carry and maintain their businesses and occupations, and because of the repeated and numerous seizures and sales of such property that will be made by such Defendant Tax Collectors, and such a multiplicity of litigation would be inflicted on and caused to each of said Complainants, and such other persons, and their businesses and occupations would be

so interrupted, damaged and destroyed and such tremendous amounts of moneys, costs and expenses would be collected out of them or their property seized and sold therefor, and the damages resulting would be so difficult or impossible of ascertainment and computation that they have no adequate remedy at law in the premises. It is further alleged that said Defendant State Attorneys, County Solicitors and Prosecuting Attorneys are threatening to prosecute Complainants under said section of said Statute of the State of Florida and that such prosecutions will affect the property and property rights of each of said Complainants and prevent them from enjoying, using or disposing of their property or transacting their business, as in the bill set forth, and will greatly lessen the value of their property and will prevent them from disposing of much property now in their possession, as in the bill set forth, and will prevent them from acquiring and disposing of like property in the future, and will prevent them from carrying out their contracts or representations in connection with property already sold or disposed of, as in the bill set forth; and that the threatened actions and proceedings of each of said Prosecuting Officers and each of said Tax Collectors will have all of said consequences and effects; and Complainants and other persons in like situation will be frequently and constantly arrested, restrained and deprived of their liberty and prosecuted in the Courts of said State by or under the authority and action of said Defendant Prosecuting Officers, and that Complainants and other persons in like situation have no adequate action or remedy in the premises at law and can only obtain suitable or adequate relief in a Court of Equity. See Bill of Complaint, paragraphs XII, XIV, XXI and XXII.

Printed Record, pages 13-19, 21-23.

We submit that it is manifest that cases, holding that in the matter of an ordinary levy or threat to levy on personal property to enforce the payment of a tax where there are no special circumstances involved and where the party has an adequate remedy by an action of damages at law, or where there is an ordinary and reasonable sum assessed as a tax and a party can pay it without any special injury or inconvenience and suit or recovery at law that a Court of Equity will not grant an injunc-

tion, have nothing whatever to do with this case, but that this case comes within the other decisions and the rule that where there are special facts and circumstances that call for equitable relief that the injunction will be granted. There is present in our case every ground upon which such an injunction should be granted, as stated and laid down in the decisions of this Court. The doctrine that a Court of Equity will enjoin the collection of a tax where the bill contains such allegations has been repeatedly held and declared by this Court. It is stated in a very recent case as follows:

> "The right to invoke the equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions. (Sec. 117 of Act; Sec. 5506, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the act."
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> Ohio R. & W. R. Co. vs. Dittey, 232 U. S., 576, 587; 58 L. Ed., 738, 743.
>
> Fargo vs. Hart, 193 U. S., 490, 503; 48 L. Ed., 761, 767.

The doctrine that the collection of taxes will be enjoined in such cases is also clearly stated in the opinion of this Court delivered by that great Chancellor, Mr. Justice Bradley, wherein the following language is used:

> "It can not be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone."
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> 113 U. S., 516, 526-527; 28 L. Ed., 1098, 1102.
>
> Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 37, 38; 52 L. Ed., 78, 88.
>
> Cummings vs. Merchants Nat. Bank, 101 U. S., 153; 25 L. Ed., 903.

CASES CITED IN BRIEF FOR APPELLANTS DO NOT SUSTAIN THE CONTENTION THEREOF THAT THERE IS NO GROUND IN THE BILL OF COMPLAINT FOR RELIEF IN EQUITY AGAINST TAX COLLECTORS.

Appellants contend in their brief that there is no ground shown by the Bill of Complaint for relief in equity against the Tax Collectors and cite certain cases supposed to sustain that contention. In the argument and the attempted application of the citations in the brief for Appellants, the numerous grounds of equity jurisdiction alleged and specifically stated in the Bill of Complaint are ignored. Appellants might cite innumerable cases to the effect that the mere facts that a tax is illegal and that there is a threat to levy on personal property to collect the same are not sufficient alone and without any other circumstances or grounds of equity jurisdiction to entitle a Complainant to an injunction, but what has that to do with this case? The Bill of Complaint in this case alleges and specifically states the facts to support several grounds of equity jurisdiction which, under all the decisions of this Court and under the authorities generally, are sufficient to entitle the Complainants to the relief prayed in the bill. Among others are the grounds of multiplicity of suits, and multiplicity of arrests and prosecutions, and enormous sums of license taxes, fines and penalties, costs and expenses, and frequent imprisonments to which Complainants will be subjected; the peculiar character of the property that would be levied on and seized, from time to time, namely their stocks of merchandise; the injury to and breaking up of their businesses; the prevention of their doing business and selling many kinds of goods and merchandise; the depriving them of customers and trade, and loss of credit, the great difficulty or impossibility of ascertaining and computing the amounts of such damages; and the fact that these facts and the matters, concerning which relief is sought, apply to a large number, to-wit: about 5,000 merchants located and doing business in Florida; all and each are sufficient to sustain equity jurisdiction and to entitle Complainants to the relief prayed in the bill.

See Bill of Complaint, paragraph 21 and paragraph 22, Printed Record, pages 21, 22, 23; paragraph 9, Printed Record, page 12.

All the cases decided in this Court, cited by Appellants, upon this point, expressly sustain the equity jurisdiction wherever there are such circumstances as are alleged in the Bill of Complaint in this case, and we have already, in this brief, cited a number of decisions of this Court sustaining the jurisdiction and the exercise thereof. As stated, the decisions of this Court cited by Appellants in every instance declare that such relief will be granted in equity where there is any equitable ground stated for it, such as any one of the grounds stated in this Bill of Complaint. For instance, in the case of Pacific Express Company vs. Siebert, cited by Appellants, it is expressly declared that either the fact that a Complainant may be subjected to a multiplicity of suits or his business may be ruined, or he may be otherwise irreparably injured, will entitle the Complainant to an injunction. This Court therein uses the following language:

> "But when the illegality of the tax or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further, and make out a case that can be brought under some recognized head of equity jurisdiction; such as, that the collection of the tax sought to be restrained may entail a multiplicity of suits, or cause some other irreparable injury, as, for instance, the ruin of complainant's business; or, where the property is real estate, throw a cloud upon the title of the complainant."
>
> Pacific Express Co. vs. Seibert, 142 U. S., 339; 35 Law Edition, 1035-1038.

Appellants cite several Florida cases which they claim sustain their contentions that a Court of Equity has not jurisdiction to enjoin such threatened levy and seizures to collect such taxes. As this Court has frequently held the contrary, of course the decisions of the Supreme Court of Florida could

not control or affect the equity jurisdiction of the United States Courts in the premises, but said decisions of the Supreme Court of Florida were in cases where there was no such showing of grounds of equitable jurisdiction as there are in this case. Furthermore, the Supreme Court of Florida in later decisions has declared the law as we have shown in Florida cases heretofore cited fully declaring the equitable jurisdiction and the right of Complainants to injunction where there are equitable grounds for relief such as are stated in the Bill of Complaint herein.

Croom, et al., vs. Pennington and Evans, 59 Fla., 473, 475.
Louisville and Nashville R. R. Co. vs. R. R. Commissioners of Florida, 63 Fla., 491, 502-3. 58 So., 547.

THE OPINION FILED IN THE DISTRICT COURT IN THIS CASE CLEARLY SHOWS AND SUSTAINS GROUNDS OF JURISDICTION AND RELIEF.

The opinion filed in this case in the District Court, being delivered by Judge Call, District Judge, states and shows so clearly sufficient grounds of jurisdiction in the Court of the case and grounds which entitle Complainants to the relief in equity prayed, that we submit that said opinion is of itself a sufficient demonstration of the correctness of the decision and orders of the Court below.

Printed Record, pages 38-44. 214 Fed. Rep., 827.

THE SUPREME COURT OF FLORIDA SUSTAINS THE JURISDICTION IN THIS CASE.

Counsel for Complainants is not sustained by the Supreme Court of our own State of Florida in his contentions as to want of jurisdiction in the United States Court in Equity, either as to its being a suit against the State or as to its not being a proper suit for equitable relief. While the decisions of the Supreme Court of Florida could not bind the Federal Courts in the exercise of equity jurisdiction or in the protection of the rights of citizens of the United States under the Constitution of the United States, yet it so happens that the Supreme Court of Florida does not sustain the contentions of the Attorney

General, but on the contrary sustains the jurisdiction of the United States District Court in Equity to entertain the suit and to grant the relief prayed.

Thus in a suit that was brought by Pennington and Evans against A. C. Croom, as Comptroller of the State of Florida, said Comptroller being the head of the financial department of the government of Florida, and said suit being, by a bill in equity to cancel tax sale certificates on lands of Complainants, the lands having been bidden in at the tax sale by the State and the certificates having been issued to and standing in the name of the State, the Supreme Court of Florida held that it was not a suit against the State and that a Court of Equity could grant the relief prayed. Said Supreme Court in said case used the following language:

> "Such a proceeding is not a suit against the State, but is to correct an illegal act of an officer. A suit to obviate the effect of an illegal act of an officer as such is not a suit against the State, for the State authorizes only legal acts by its officers. The State acquires no right under an illegal and void tax certificate issued to it by its officers, and the illegal act of the officer may be reached by the courts in proper proceedings."
>
> Croom, et al., vs. Pennington & Evans, 59 Fla., 473, 475.

The Supreme Court of Florida has further specifically held and declared that illegal action of State Officers may be enjoined when the ordinary remedies afforded by the Courts of law are inadequate; that a suit against State Officers for such relief, where they are acting under invalid authority, or exceeding or abusing their lawful authority and invading private rights that are secured by the constitution, is not a suit against the State; and said Supreme Court of Florida specifically cites and approves said case of Ex-Parte Young and the doctrines and rules laid down therein by this Court. The Supreme Court of Florida uses the following language:

> "When officers of the State act under invalid authority or exceed or abuse their lawful authority and thereby invade

private rights that are secured by the constitution, an action to redress injuries caused by the unauthorized act is not a suit against the State, since the acts of officials that are not legally authorized or that exceed or abuse authority or discretion conferred upon them are not acts of the State. See Croom vs. Pennington & Evans, 59 Fla., 473; 52 South. Rep., 957. Where action taken by State Officials is unauthorized and substantially impairs private rights in violation of the constitution, such action will not be enforced. Pensacola & A. R. Co. vs. State, 25 Fla., 310; 5 South. Rep., 833. State ex rel. Railroad Commissioners vs. Louisville & N. R. Co., 57 Fla., 526; 49 South. Rep., 39. State ex rel. Railroad Commissioners vs. Florida East Coast R. Co., 58 Fla., 524; 50 South. Rep., 425. Illegal action taken by State Officials may be enjoined when the ordinary remedies afforded by Courts of Law are inadequate. Ex-Parte Young, 209 U. S., 123. — Sup. Ct. Rep., —. Trustees I. I. Fund vs. Bailey, 10 Fla., 112. Broward vs. Mabry, 58 Fla., 398; 50 South. Rep., 826. Hopkins vs. Clemson Ag. Col., 221 U. S., 636."

Louisville & Nashville R. R. Co. vs. R. R. Commissioners of the State of Florida, 63 Fla., 491, 502-3. 58 Southern, 547.

WHERE OBJECTION IS MADE TO A STATE STATUTE THAT IT IS UNCONSTITUTIONAL BECAUSE OF VIOLATING THE CONSTITUTION OF THE UNITED STATES AND THAT IT ALSO VIOLATED THE CONSTITUTION OF THE STATE, A FEDERAL QUESTION IS PRESENTED, THE UNITED STATES COURT HAS JURISDICTION AND MAY DECIDE ALL QUESTIONS INVOLVED.

"The unconstitutionality of a statute may depend upon its conflict with the Constitution of the State or with that of the United States. If conflict with the State Constitution is the sole ground of attack, the Supreme Court of the State is the final authority (Merchants' & M. Nat. Bank vs. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236, 17 Sup. Ct. Rep.

829, and cases cited in the opinion); while, in the other case, the ultimate decision rests with this Court. The validity of this act has not been directly presented to or determined by the State Court, but the first attack by the parties interested is made in the Federal Court and by this suit, and conflict with both constitutions is alleged. Undoubtedly a Federal Court has the jurisdiction, and, when the question is properly presented, it may often become its duty to pass upon an alleged conflict between a statute and the State Constitution, even before the question has been considered by the State tribunals. All objections to the validity of the act, whether springing out of the State or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination."

Michigan Central Railroad Company vs. Powers, Auditor General of the State of Michigan, 201 U. S., 245, 290, 291; 50 L. Ed., 744, 760.

San Francisco Gas & Electric Co. vs. City and County of San Francisco, 189 Fed., 943.

Des Moines City Railway Co. vs. City of Des Moines, 158 Fed., 854.

INTERLOCUTORY INJUNCTION WAS PROPERLY GRANTED TO COMPLAINANTS IN THIS CASE.

The allegations of the Bill of Complaint show fully the facts which entitle Complainants to an interlocutory injunction, among other things that said Tax Collectors are threatening to and will immediately proceed to collect said license taxes and will seize and sell the property of each of Complainants and of each and every other person in like situation, and will enter upon their stocks and warehouses and will interrupt and interfere with their businesses and seize their stocks of wares, goods and merchandise, and will cause each of them loss of business, trade and customers, and will sell such property at forced sales and at sacrifices, and will not only cause them loss and damage by reason of seizing and taking their property, but will also, on account of the peculiar character and uses of the property, to-wit: their stocks of merchandise wherewith and whereby they exercise, carry on and maintain their businesses

and occupations, and the injury to their businesses and occupations and credit and loss of customers and because of the repeated and numerous seizures and sales of such property and because such a multiplicity of litigation would be inflicted on and caused to each of them and their businesses and occupations would be so interrupted, damaged and destroyed and such tremendous amounts of moneys, costs and expenses would be inflicted upon them or collected out of them or their property seized and sold therefor, and the damages resulting would be so difficult or impossible of ascertainment and computation that they would have no adequate remedy at law. Also that said Defendant Prosecuting Officers are threatening to prosecute Complainants for nonpayment of said license taxes and such prosecution will affect the property and property rights of each of said Complainants, will prevent them from enjoying, using or disposing of their property or transacting their business, as aforesaid, and will greatly lessen the value of their property and will prevent them from disposing of much property now in their possession, as aforesaid, and will prevent them from acquiring and disposing of like property in the future, and will prevent them from carrying out their contracts or representations in connection with property already sold or disposed of, as aforesaid; and that each of said Complainants and persons in like situation will be frequently and constantly arrested, restrained and deprived of their liberty and prosecuted in the Courts of the United States, and that they have no adequate relief at law, and that all of said damages and injuries will be inflicted immediately unless restrained and enjoined by this Court.

See paragraphs XXI and XXII of the Bill of Complaint. Printed Record, pages 21-23.

In the leading case of Ex-Parte Young, hereinbefore cited and quoted from, the matter came up in pursuance of and upon the enforcement of an order of the Circuit Court of the United States for the District of Minnesota, in the case of Charles E. Perkins, et al., against Edward T. Young, Attorney General of the State of Minnesota, et al. In that case a restraining order was granted and afterwards a temporary or interlocutory injunction was granted. One of the grounds of objection made

in the Circuit Court and in the Supreme Court of the United States was that the interlocutory injunction should not have been granted because the parties interested had a plain and adequate remedy at law. That the proper way to test the constitutionality of the act was to disobey it at least once and stand a prosecution in the Criminal Court of the State and so have the law tested. The Supreme Court, however, states that it is not necessary for Complainant to await such prosecution but that a Court of Equity has jurisdiction to enjoin the enforcement of such unconstitutional statute and that the granting of an interlocutory injunction is proper.

Ex-Parte Young, 209 U. S., 163; 52 L. Ed. 730.

We submit that it is clear upon well established principles that the interlocutory injunction was properly granted to Complainants in this case. If it had not been granted, they would have been greatly and irreparably damaged and injured, while the granting of the interlocutory injunction could not materially damage or injure the Defendants or anyone else. If it should be finally decided that these license taxes are constitutional and valid, the Complainants and all other merchants doing business in Florida, or persons required by the statute to pay them would have to pay them, and the property of all such persons may be summarily seized by the Tax Collectors and sold to collect such taxes, or such persons may be prosecuted by the Prosecuting Officers of this State so that obviously there is no danger of any loss or damage to the Defendants or any one by granting of the interlocutory injunction, whereas the refusal of the interlocutory injunction would have inflicted great injury and damage upon, and possibly have been ruinous to Complainants and many other persons in like situation.

It is well settled that in such a case, even if it be doubtful whether the ultimate decision of the case will be in favor of Complainants, yet an interlocutory injunction will be granted.

The law upon this subject is thoroughly considered and stated with particular clearness, and many authorities upon the

subject are cited in the case of Wilmington City Railway Company vs. Taylor, 198 Fed., 159, 197, and we therefore quote a portion of the opinion in that case.

"On the question of the circumstances determinative of the propriety of granting or withholding preliminary injunctions there are certain well-settled principles. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the Defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the Complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the Complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption be sustained by the Defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to or widely vary in degree as between the showing of the Complainant and that of the Defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and

legitimate business through its destruction or interruption in whole or in part strong and convincing proof of right on the part of the Complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the protection of property or legitimate business, or the maintenance of the status quo, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, even though there be serious doubt of the ultimate success of the Complainant. There is abundant authority in support of these views. Russell vs. Farley, 105 U. S., 433, 438; 26 L. Ed., 1060. City of Newton, vs. Lewis, 79 Fed., 715; 25 C. C. A., 161. Glascott vs. Lang, 3 Myl. & C., 451, 455. Hadden vs. Dooley, 74 Fed., 429, 431; 20 C. C. A., 494. Great Western R. Co. vs. Birmingham, etc., R. Co., 2 Phil. Ch., 597. Shrewsbury & Chester R. Co. vs. Shrewsbury R. Co., 1 Sim. N. S., 410, 426, 427, 432. Denver & R. G. R. Co. vs. United States, 124 Fed. 156; 59 C. C. A., 579. Buskirk vs. King, 72 Fed., 22; 18 C. C. A., 418. Sanitary Reduction Works vs. California Reduction Co. (C. C.) 94 Fed., 693. Southern Pac. Co. vs. Earl, 82 Fed., 690; 27 C. C. A., 185. New Memphis Gas & Light Co. vs. Memphis (C. C.) 72 Fed., 952. Indianapolis Gas Co. vs. Indianapolis (C. C.) 82 Fed., 245. Georgia vs. Brailsford, 2 Dall., 402; 1 L. Ed., 433."

See Wilmington City Railway Company vs. Taylor, 198 Fed., 197.

The Bill of Complaint is sworn to positively in this case by three different persons. This, of course, is the same as three different affidavits in support of the application for an interlocutory injunction. Interlocutory injunction may be granted upon the sworn Bill of Complaint without other affidavits.

City of Kankakee vs. American Water Supply Company, 199 Fed., 758.

Even where there is an answer to the Bill of Complaint filed, and even where the answer is under oath in response to the

requirements of the bill, the Court will grant an interlocutory injunction, or will refuse to dissolve a temporary injunction already granted, if, under the circumstances of the case, it seems proper to protect the Complainants or preserve the status until final hearing, or if for any other reason it seems proper to the Court so to do.

Linton vs. Benham, 6 Fla., 533.
Carter vs. Bennett, 6 Fla., 214.
Godwin vs. Phifer, 51 Fla., 441; 41 So., 597.
Holt vs. H. S. Co., 56 Fla., 801; 47 So., 934.

There are no answers or affidavits filed by Defendants herein, but so strong is the rule that in case of doubt that an interlocutory injunction will be granted to protect and preserve rights that may be endangered that even where there are conflicting affidavits and it appears that the Complainants may suffer serious injury or damage if the interlocutory injunction is not granted, it should be granted, and thus the status be preserved and the rights of Complainants be protected, until evidence can be taken and the case can be determined upon the merits.

Carter vs. Forten, 172 Fed., 722, 729.

DEFINITION OF PHRASE "WHO SHALL OFFER WITH MERCHANDISE, ETC."

To offer merchandise for sale or to offer anything with merchandise which shall be bargained or sold does not require any distinct offer. Thus the Florida Statute concerning the offering with merchandise bargained or sold any coupons, etc., does not require that the merchant shall make any distinct offer of the coupon apart from the package of merchandise in which it is contained or to which it is attached or with which it is delivered. It is well settled concerning such statutes that the article may be "offered" by merely having the article for sale or delivery, or keeping the article in the store or store-room of the merchant, or holding the same for disposition in connection

with the business of selling and does not require any actual proffer to some particular person. Hence in this case such "offer" applies to all the transactions mentioned in the Bill of Complaint and to all the coupon or insert goods held or dealt in by Complainants or any other merchants.

U. S. vs. Dodge, 25 Fed. Cases, 879.
State vs. Dunbar, 13 Oregon, 591; 11 Pac., 298, 299.
Willis vs. Standard Oil Co., 50 Minnesota, 290; 52 Northwestern, 652, 653.

SAID PROVISIONS OF SECTION 35 OF SAID STATUTE OF FLORIDA, COMPLAINED OF IN THE BILL, ARE UNCONSTITUTIONAL, ILLEGAL AND VOID.

Said provisions of Section 35 of said Statute of Florida are unconstitutional and in violation of several of the articles of the Constitution of the United States, as particularly specified in the Bill of Complaint. In discussing in this brief said violations of the constitution we shall deal with them in such order as seems most convenient for argument, without following exactly the order in which they are stated in the bill, and we shall first present and submit the proposition that said section of said statute is in violation of the Fourteenth Amendment to the Constitution of the United States.

SAID PROVISIONS OF SAID STATUTE ARE CONTRARY TO AND IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The enactments and provisions of said Section 35 of said Statute of Florida providing for and requiring the payment of said license taxes in the Bill of Complaint mentioned and complained of are, we submit, clearly unconstitutional, illegal and void in that they attempt to abridge the privileges and immunities of Complainants and other citizens of the United States

and to deprive Complainants and other persons of liberty and property without due process of law, and to deny to Complainants and other persons within the jurisdiction of said State the equal protection of the law in the particulars in said Bill of Complaint specified in paragraph XIV thereof, Section 2, subdivisions A to N, inclusive. Record, pages 16-19. In considering these matters of violation of the Fourteenth Amendment we shall first consider the proposition that the attempted or pretended classification under and upon which said license taxes are imposed and based is not founded upon any reasonable grounds or just distinctions, but is arbitrary and discriminating.

THERE IS NO JUST OR REASONABLE CLASSIFICATION UPON WHICH SAID LICENSE TAXES ARE BASED.

As stated in the Bill of Complaint, there is no just or reasonable basis of classification upon which said license taxes are based, but the attempted or pretended classification is arbitrary and discriminating and not based upon any just distinction. These propositions are stated in paragraph XIV of the Bill of Complaint, subdivision A, B and C, pages 16-17 of Printed Record. Such illegal classification was the principal ground upon which the Washington Statute was held unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, and interlocutory injunction against the Attorney General of said State, the Prosecuting Attorney of Spokane county and the County Treasurer of said county was granted by the Judges in the case of Little vs. Tanner as Attorney General, et al., in the District Court of the United States for the Eastern District of Washington, Northern Division, 208 Fed., 605, hereinbefore cited and also in this case of ours in the Court below.

Record, 38-44; 214 Fed., 827.

In said Section 35 of said Florida Statute there is a license tax imposed upon merchants, druggists and storekeepers generally, to-wit: for the first thousand dollars, or fraction thereof, of stock of merchandise three dollars in each county and for

each place of business, and one and one-half dollars for each additional thousand, or fraction thereof, but dealers in merchandise at wholesale only shall pay a license tax of one and one-half dollars for each one thousand dollars of their stock of merchandise. In addition to these regular license taxes every person, firm or corporation who shall offer with merchandise bargained or sold any coupon, profit-sharing certificate, etc., redeemable in premiums, is required to pay annually a State license tax of five hundred dollars and a county license tax of two hundred and fifty dollars in each and every county in which said business is conducted or carried on, and the same taxes for each place of business, and is required to pay the same amounts of license taxes where any such coupons, etc., shall be offered with merchandise bargained or sold, redeemable by any other person, firm or corporation for each other person, firm or corporation who may redeem the same, and it is expressly stated that the license taxes prescribed in said section shall be in addition to other licenses prescribed in the act. It is further provided in said section that merchants using trading stamps shall pay a license tax of two hundred and fifty dollars for each place of business where they use such stamps.

It will be seen from the above provisions that certain license taxes are imposed upon merchants, druggists and storekeepers generally in proportion to the valuations of their stocks of merchandise, then in addition to said general license taxes enormous additional license taxes are imposed upon each such person, firm or corporation who shall offer with merchandise bargained or sold any coupon, profit-sharing certificate or other evidence of indebtedness or liability redeemable in premiums. Manifestly these license taxes are not license taxes on the occupation or business, but are license taxes on mere incidents of the business discriminating and imposing enormous additional license taxes on merchants who advertise their business in a certain way or who give certain discounts or premiums for cash sales, or who give profit-sharing certificates to their customers, or who give certain articles or presents as methods of increasing their business by obtaining the good will of their customers or additional trade by certain inducements. These methods of advertising or of giving discounts or premiums or

inducements for trade contain nothing in them of a gambling nature or character and nothing injurious to the health, morals or welfare of the community, as is manifest from the very nature of the transactions, and as has been established by numerous decisions of the State Courts. The character and the application of these methods of dealing and instances of many of the articles, including a great variety of merchandise of different sorts, as well as many other articles of merchandise not specified, and the exorbitant, oppressive and prohibitory character and amount of such license taxes are set out in detail in paragraphs II, III, IV, V, VI, VII, VIII, IX and X of the Bill of Complaint. We submit that it is perfectly manifest upon the face of the statute that the license taxes complained of are not based upon any just or reasonable classification of different kinds of businesses or occupations, but are merely arbitrary, unjust and unreasonable impositions upon merchants who advertise their goods or business in a certain way, or give certain discounts or profit-sharing certificates, or inducements or premiums to induce trade or build up their business, or to induce cash purchases, and to make their businesses more beneficial and profitable. The provisions of the statute in substance do not really constitute taxation at all, but are attempts, under the pretense of taxation, unfairly and unjustly to prohibit Complainants and all others in like situation from advertising their business by certain methods and increasing or building up their business, or by increasing cash purchases in a certain method, none of which are harmful or injurious to the community, but are beneficial to their customers as well to themselves.

Such methods of advertising business or inducing trade or securing the good will of customers are not any new or artificial schemes or devices. They are a mere development of immemorial usage of trade and are of precisely the same nature as when the storekeeper gave a ginger snap or an apple or anything else to a child coming in to purchase, or gave a present to a purchaser, or a discount for cash. Such inducements to trade and customers or to cash purchasers have always been much used by merchants; and when now the manufacturer or packer of soap or starch or coffee or flour or tobacco, or any

other article, puts coupons in the packages or in the wrappers thereof, whereby a purchaser purchasing a sufficient number of the packages to accumulate a sufficient number of such coupons or profit-sharing certificates to get some article of value in exchange therefor, or where the Florida merchant gives with articles sold by him coupons or certificates or cash register slips or memoranda, or the like, redeemable by himself, as alleged in paragraph IV of the Bill of Complaint, it is merely a natural growth of the immemorial custom above referred to of merchants giving something extra or some article or present or discount with goods sold, which has merely taken more extensive and more regular and systematized forms, in the same kind of growth and development that is applied to all the systems and modes of business with the natural growth of the business of the country.

The Legislature might as well impose these license taxes on any merchant who advertises in a newspaper or any merchant who gives any discount whatever for cash or on account of the goods that a customer purchases or the amount of trading that a purchaser does with him. The prohibitory license taxes on profit-sharing certificates seems broad enough to prevent any practice or development of profit sharing in any mercantile business and to stop all progress in a direction generally recognized as one of great improvement and much promise for the public welfare. The pretended classification upon which said license taxes are based is entirely arbitrary, unreasonable and unjust.

SUCH CLASSIFICATION HAS BEEN REPEATEDLY HELD BY THE SUPREME COURT OF THE UNITED STATES TO BE UNCONSTITUTIONAL AND IN VIOLATION OF THE FOURTEENTH AMENDMENT.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." * * * "Classification to relieve a law from the charge of a denial of equal protection can not be made arbitrarily, but must be based

upon some difference which bears a just and proper relation to the attempted classification."

Gulf, Colorado & Santa Fe Railway Company vs. Ellis, 165 U. S., 150-159; 41 L. Ed., 666-669.

"Accepting, however, the full force of the general language in which the statute is couched, it appears that a classification is attempted between stock yards doing a large and those doing a small business. The express and only basis of classification is in the amount of business done by the two classes." * * *

"Clearly the classification is based solely on the amount of business done, and without any reference to the character of value of the services rendered." * * *

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other." * * *

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

Cotting, et al., vs. Godard, as Attorney General of the State of Kansas, 183 U. S., 79, 103, 104, 112; 46 L. Ed., 92, 106, 109, 110.

"The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its juris-

diction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Barbier vs. Connolly, 113 U. S., 27, 31; 28 L. Ed., 923, 924.

Another very strong and applicable case sustaining our contentions in this matter is that of Southern Railway Company vs. Greene wherein the Supreme Court of the United States reversed the Supreme Court of Alabama and held an Alabama Statute imposing a franchise tax to be in violation to the Fourteenth Amendment to the Constitution of the United States. We insert some quotations from that case:

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation."

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing

business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification can not be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, can not be justified by calling it classification. Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S., 150, 155, 165; 41 L. Ed., 666, 668, 671; 17 Sup. Ct. Rep., 255. Cotting vs. Kansas City Stock Yards Co. (Cotting vs. Godard), 183 U. S., 79; 46 L. Ed., 92; 22 Sup. Ct. Rep., 30. Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 559; 46 L. Ed., 679, 689; 22 Sup. Ct. Rep., 431.

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment that such attempted taxation under a Statute of the State does violence to the Federal Constitution."

Southern Railway Co. vs. Greene, 216 U. S., 400, 412, 417, 418; 54 L. Ed., 536, 539, 541, 542.

THE SUPREME COURT OF FLORIDA HOLDS THAT SUCH CLASSIFICATION RENDERS THE STATUTE UNCONSTITUTIONAL AND VOID UNDER THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE CONSTITUTION OF FLORIDA.

In a recent case decided in 1908 by the Supreme Court of Florida, that Court held and declared to the fullest extent the doctrine that a statute of Florida imposing burdens or affecting property rights based upon arbitrary classifications or classifications not reasonable and affecting persons engaged in the same occupations and discriminating where there are not such reasonable and practicable differences in the carrying on of the business as to warrant such differences of classification, that such an act is unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States, as well as under the Constitution of Florida. The Supreme Court of Florida in that case went much further in the application of the doctrine than the Court is asked or required to do in the present case. In that case the Supreme Court of Florida held that certain burdens imposed by the statute upon a railway company not imposed upon other carriers was a classification not based upon reasonable or sufficient differences and was unconstitutional and void. There might be a much stronger argument made in favor of the legality of a classification which separated railways from certain boats or other water lines of transportation, or from individual carriers or the like, than can be made to sustain the Statute of Florida in this case imposing enormous burdens of taxation for license exactions upon merchants who advertise or offer inducements in their business by coupons or the like and which are not imposed on or exacted of merchants doing the same kind of business but who do not advertise or offer such inducements. The Supreme Court of Florida also expressly held in that case that the decisions of the Supreme Court of the United States laying down principles as to legality of classifications are controlling as to the Florida

Statute, since it involves a Federal question and the effect of the Fourteenth Amendment to the Constitution of the United States.

"2. The provision of the State Constitution that no person shall be deprived of property without due process of law, and the provisions of the Fourteenth Amendment of the Constitution of the United States as to property rights, extend to the property held and used by corporations, since the beneficial ownership of such property is in natural persons, and the law forbids the doing by indirection that which is forbidden to be directly done.

"3. The legality of classifications adopted for legislative regulation may be determined with reference to the due process of law provision of the State Constitution; but as such determination involves a Federal question the decisions of the Supreme Court of the United States control.

"4. Classifications adopted for legislative regulation should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary; and all similarly situated or having similar legal duties and obligations in regard to the subject regulated, should be included in one class, at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare.

"5. The legal duties of persons, firms or corporations operating railroads may be of a peculiar nature and essentially different from the duties of other common carriers, and as to such matters they may be separately classified for purposes of legislative regulation.

"6. Where the subject of regulation as in Chapter 5424, Acts of 1905, is payment for goods lost in transit by a common carrier, a subject as to which the legal duties of all common carriers are similar, and there appears to be no reasonable basis for imposing the burden of the regulation upon railroads alone, a statute making such regulation applicable to railroads only, provides for an unreasonable classification that in effect denies to those operating railroads due process of law and the equal protection of

laws in violation of constitutional rights, and such statute is inoperative."

Seaboard Air Line Railway vs. Abe Simon & Co., 56 Fla., 545; Fla. Reports 56, 1908.

UPON THE STATEMENTS AND ADMISSIONS OF THE PLEADINGS AND PROCEEDINGS IN THIS CASE DEFENDANTS ADMIT THAT THERE IS NOTHING IN THE USE OF SUCH COUPONS, PROFIT-SHARING CERTIFICATES, ETC., THAT IS PREJUDICIAL TO PUBLIC HEALTH, SAFETY, MORALS OR WELFARE OR THAT BRINGS IT UNDER THE POLICE POWER OF THE STATE OR JUSTIFIES OR AUTHORIZES ITS PROHIBITION OR SUPPRESSION DIRECTLY OR BY LICENSE TAXES, AND ADMIT THAT SAID LICENSE TAXES ARE NOT IMPOSED FOR PURPOSES OF REVENUE OR TAXATION.

The facts stating how such coupons, profit-sharing certificates and the like are issued and used in the matters involved in this case are stated in detail in the Bill of Complaint.

Bill of Complaint, paragraphs 3, 4, 5, 6, 7, 8, 9, 10, Record pages 7 to 12.

It is also expressly alleged and stated in the Bill of Complaint that they in no way so affect the public health, safety, convenience, comfort, morals or welfare as to be subject to police control or regulation by said State or the Legislature thereof and that the said provisions of said statute and the said imposition of said license taxes are in no way a legitimate or lawful exercise of any police power of said State or of the Legislature thereof.

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Bill of Complaint, paragraph 7, Record page 11.

Bill of Complaint, paragraph 14, subdivision K, Record page 18.

It is further expressly alleged in the Bill of Complaint as follows:

> "That by the use of the system of delivering such coupons, slips, certificates or other tokens with merchandise sold, the merchant is enabled to give a discount to purchasers or to give an additional value to purchasers in the shape of the premiums or articles sold for or exchanged for such coupons, slips, certificates or other tokens, and the purchasers of such articles of merchandise are substantially benefited thereby."
>
> Bill of Complaint, paragraph 6, Record page 11.

It is also alleged that said annual or semi-annual license taxes, though under the guise of a revenue measure and taxation, are, in fact, not such, and are not imposed for the purpose of revenue or taxation, but are intended for the purposes of prohibiting and preventing the doing of business and the enjoying and disposing of property and the exercising of the rights of property and of liberty and of having the equal protection of law to which Complainants and all other persons in like situation are entitled and in which they are protected by said Article 14 of the Constitution of the United States of America.

> Bill of Complaint, paragraph 14, subdivision I, Record page 18.

It is also alleged in said Bill of Complaint that said annual or semi-annual license taxes are prohibitory and not productive of revenue and will prohibit and prevent Complainants and all other persons in like situation from using such coupons, profit-sharing certificates, etc. Also, the detailed facts which substantiate these allegations are stated in the Bill of Complaint.

> Bill of Complaint, paragraph 14. Subdivisions F, G, H and I, Printed Record pages 27, 28, 29.
>
> Bill of Complaint, paragraph 12, Record pages 22, 23 and 24.

There has been no answer filed by any of the Defendants

and there is no denial of any of the allegations of the Bill of Complaint, but, on the contrary, the Defendants having filed only a motion to dismiss the Bill for want of jurisdiction and for want of equity, etc., admit all the allegations of said bill. The Bill of Complaint states, in detail, the facts concerning the use of such coupons, profit-sharing certificates, etc., and the manner and methods of their use, which clearly show that there is nothing therein that comes under the police power. And it is also expressly alleged in the Bill of Complaint that the said use of said coupons, profit-sharing certificates, etc., is in no way prejudicial to public health, safety, morals or welfare.

The Bill of Complaint also states and shows the enormous and prohibitory amounts and character of these so-called license taxes, and expressly alleges that Complainants will not be able to carry on their respective businesses and to use such coupons and profit-sharing certificates, etc., if they have to pay said prohibitory so-called license taxes, and the bill alleges that, in fact, no revenue will be derived from said so-called taxes, and alleges that said provisions of said statute were not exacted for the purposes of taxation or collecting any revenue, but for the purpose of prohibiting and preventing the use of such coupons, profit-sharing certificates and so forth. We have cited above various paragraphs and subdivisions of the Bill of Complaint containing these statements and allegations.

Said allegations of the Bill of Complaint are allegations of the facts in detail and of the ultimate facts which are material in the case, and they are admitted by the motion to dismiss the bill. No argument can be made, or is admissible, for Defendants herein that perchance that in some part of the business that may be done, wherein coupons or profit-sharing certificates are offered or given with merchandise, that there may be the intervention of some trading-stamp company that may increase the price of the merchandise, or any other contention that the business may be in any way injurious to the people of the State or may be subject to the police power. The Defendants have made no answer setting up any such allegations. There is nothing in the record from which the Court can infer

anything of the sort, and there are the positive allegations of the Bill of Complaint which are not matters of opinion or of conclusion but which state the facts and state that in fact, by the use of such coupons or profit-sharing certificates, the merchant gives additional value to purchasers and the purchasers of such articles are materially benefited thereby. The facts are stated in the Bill of Complaint showing that there is no element of gambling or chance involved. That the purchasers select the articles which they receive as premiums from catalogues that are furnished, or where there is a discount or rebate, that it is known and fixed in every instance in advance of the purchase what such discount or rebate is to be or the amount thereof. Therefore, there can not be any argument that perchance there may be facts to sustain the statute when not only there is no answer setting up any such facts, but when the bill in its detailed statements and in its general, ultimate statements shows and alleges the contrary to any such hypothetical contentions or arguments on behalf of Defendants.

It is also positively alleged in the bill in detail that these license taxes are, in fact, prohibitory. That the Complainants, in fact, can not do the business mentioned, which they were previously doing and which was a part of their existing business, and pay such license taxes.

See Bill of Complaint, paragraph 14, subdivisions F, G, Printed Record pages 17 and 18.

Also paragraph 12, Printed Record pages 13, 14 and 15.

It is also further alleged in the Bill of Complaint that these license taxes are not productive of revenue, and are not imposed for the purpose of revenue or taxation, but will prohibit Complainants and all persons in like situation from doing business and using such coupons, profit sharing certificates, etc., as in the Bill of Complaint more particularly set forth.

See Bill of Complaint, paragraph 14, subdivisions G, H and I, Printed Record page 18.

All of the allegations of the Bill of Complaint, above men-

tioned, as well as the detailed facts in the bill which support same, are allegations of fact and are so stated in the bill; they are not matters of conclusion or opinion or stated as such, but are detailed facts and the ultimate facts material to the case and are admitted by the motion to dismiss.

The allegations of the Bill of Complaint as to the character of the business and use of such coupons, profit-sharing certificates, etc., and that it contains no element of gambling and that there is nothing in connection therewith or in the use of the same that is prejudicial to public health, safety, morals or welfare, and that, in fact, there is thereby given to purchasers either a discount or an additional value in premiums or articles and that the purchasers of such articles of merchandise are substantially benefited thereby, are allegations of fact admitted by the motion to dismiss.

American School of Magnetic Healing vs. McAnnulty, 187 U. S., 94, 103; 47 L. Ed., 90, 94.

So the allegations that these enormous license taxes which are stated in detail in the Bill of Complaint with detailed statements of facts showing that they are necessarily prohibitory, and followed up by the positive allegations in the bill, not as matters of opinion and conclusion, but as ultimate facts, that said license taxes, if enforced, will, in fact, preclude and prevent Complainants and all persons in like situation from using such coupons, profit-sharing certificates, etc., from doing such business, and that, in fact, they are prohibitory and will produce no revenue and in fact are not imposed for the purpose of revenue or taxation are all allegations of fact which are admitted by the motion to dismiss.

City of St. Louis vs. Knapp, etc., Co., 104 U. S., 658, 661; 26 L. Ed., 883, 884.

The allegation of the intent or purpose with or for which a thing was done is an allegation of fact, not an opinion or conclusion. Thus a mere general allegation that a certain act was fraudulent may be merely a matter of opinion or conclusion,

but an allegation that something was done with the intent to defraud, especially where connected with other allegations as to the facts, is not a statement of a conclusion or opinion, but is the statement of a fact which is admitted by demurrer or motion.

Platt vs. Mead, 9 Fed., 91.

So, in the present case, there being no answer and no evidence upon which to base any argument for Defendant that there is anything in the use of such coupons, profit-sharing certificates, etc., that is in any way injurious to the public, and the contrary being expressly alleged in the Bill of Complaint, with facts alleged to sustain the same, and it being shown by the detailed facts and by the general allegations of the Bill of Complaint that the license tax will not and can not produce any revenue, but is prohibitory and will prevent the doing of any such business, or the use of any such coupons or profit-sharing certificates, and that the act in fact is not intended for purposes of taxation or producing revenue, the Appellants have no standing or basis for any contrary contention. In point of fact they have no standing here, under the pleadings, to make any contention excepting what they really relied on in the Court below and upon which they must stand here—namely that the Court had no jurisdiction because the case was in fact a suit against the State or that there was no jurisdiction in a Court of Equity to grant any relief in the premises, even though the allegations of the Bill of Complaint showing the unconstitutionality of the statute be admitted to be true and correct.

VERY MANY DECISIONS OF FEDERAL COURTS AND OF SUPREME COURTS OF MANY STATES HOLD SUCH CLASSIFICATION AND COUPON TAXES AS INVOLVED IN THIS CASE UNCONSTITUTIONAL AND VOID.

It is established by the overwhelming weight of authority, that such pretended classification and such attempted license taxes on account of using coupons, certificates or the like, as made in this case, are unconstitutional and void.

"A city ordinance making it unlawful for any person to sell goods and merchandise by selling trading stamps to merchants for delivery to their customers with purchases, without paying an annual license tax of $200, whether or not authorized by the city's charter, is in violation of the rights secured to citizens affected thereby by the Fourteenth Amendment to the Constitution of the United States and void; being neither a legitimate exercise of the taxing power, nor a reasonable police regulation."

Ex-Parte Hutchinson (Circuit Court D. Oregon), 137 Fed., 950.

"A city ordinance imposing a license tax of $600 per year on any person selling trading stamps to merchants, in addition to $100 per year on each merchant using trading stamps in his business, is not one for the purpose of providing revenue, but is clearly intended to prohibit the use of such stamps, and is void, as an abridgment of the privileges of citizens to engage in a legitimate business, in violation of the Fourteenth Constitutional Amendment."

Ex-Parte Hutchinson (Circuit Court D. Washington), 137 Fed., 949.

Humes vs. City of Little Rock, 138 Fed., 929.

"The use of trading stamps in retail merchandising business is legitimate, and an ordinance imposing an excessive license fee on merchants using such stamps, with the evident purpose of preventing such use, is unconstitutional and void, and a Complainant whose contract rights are injuriously affected thereby is entitled to an injunction to restrain its enforcement."

Spearing & Hutchinson Company vs. City of Tacoma, et al., 190 Fed., 682.

MASSACHUSETTS DECISIONS.

The principles upon which such statutes are unconstitutional have been very clearly and fully stated in several different cases by the Supreme Court of Massachusetts.

In the case of O'Keefe vs. City of Somerville the doctrine

is stated by the Supreme Court of Massachusetts as follows:

"Even if the Legislature might constitutionally impose an excise tax upon the business of selling articles in the usual way, it has not attempted to do so, and this statute, if it were construed in reference to the general business of selling alone, would be unreasonable and unconstitutional, because it would impose a tax upon some vendors and not upon others. We are therefore brought to the question whether the peculiar way of selling, to which the statute relates, involves a material difference in the nature of the business, such as to warrant the imposition of an excise tax on that account. The only difference referred to is the giving or delivering, as a part of the sale or in connection with it, of a stamp or other similar devise, which represents an additional right of property. Because this is entirely legitimate (see cases above cited) the attempt to tax it, as a peculiar kind of sale, is 'a discrimination founded upon an immaterial fact,' which renders such a statute invalid. Minot vs. Winthrop, 162 Mass. 113-122; 38 N. E. 512; 26 L. R. A. 259. Taking the acts referred to in the broad terms of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law. If these stamps were used in such a way as to constitute a lottery or game of chance, the use would be punishable. But this statute purports to deal with such methods of sale as appeared in Com. vs. Sisson, 178 Mass. 578; 60 N. E. 385, and in other cases above cited. One of the reasons why these methods are allowable is found in the familiar principle that constitutional liberty means 'the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.' The restrictions upon conduct which may be imposed in the exercise of the police power include everything that may be necessary in the interest of the public health, the public safety, or the public morals, and they include nothing more. These

doctrines have often been discussed and elaborated, and it is unnecessary to consider them at length in this case. In applying them to the business mentioned in this statute, no reason appears for the imposition of an excise tax upon the business of selling articles with an accompaniment of stamps which entitle the vendee to other property."

O'Keefe vs. City of Somerville, 190 Mass. 110; 77 N. E. 457, 459.

SUPREME COURT OF MASSACHUSETTS HOLDS SUCH STATUTES ARE IN VIOLATION OF FOURTEENTH AMENDMENT OF CONSTITUTION OF THE UNITED STATES.

The Supreme Court of Massachusetts has, in a recent opinion, clearly and strongly held and stated the doctrine and cited most of the leading cases as follows:

"The bill is drawn in broad terms, and it purports to forbid transactions that are not different in principle from contracts of sale which always have been held to be within the constitutional right of persons in every State to possess and acquire property, to transact legitimate business and to buy and sell and get gain. Const. U. S. Amend., art. 14; Declaration of Rights, art. 1. We can not doubt that the bill is intended only to include cases such as this Court held not to be included in St. 1884, c. 277, as amended by St. 1898, c. 576, now R. L. c. 214, par. 29. See Commonwealth vs. Sisson, 178 Mass., 578; 60 N. E., 385. The reasons for the decision in the case just cited would not apply to a decision as to the meaning of this bill.

"There is nothing in the conduct proposed to be prohibited that necessarily appeals to the gambling instinct or involves any element of chance. Such statutes and ordinances have been held unconstitutional by the highest Courts in a large number of States. State vs. Shugart, 138 Ala., 86; 35 South., 28; 100 Am. St. Rep., 17. City Council of Montgomery vs. Kelly, 142 Ala., 552; 38 South., 67; 70 L. R. A., 209; 110 Am. St. Rep., 43. Ex-Parte McKenna, 126 Cal., 429; 58 Pac., 916. Ex-Parte Drexel, Ex-Parte

Holland, 147 Cal., 763; 82 Pac., 429; 2 L. R. A. (N. S.), 588. Denver vs. Frueauff, 39 Colo., 20; 98 Pac., 389. Hewin vs. Atlanta, 121 Ga., 723, 731; 49 S. E., 765; 67 L. R. A., 795. Long vs. Maryland, 74 Md., 565; 22 Atl., 4; 12 L. R. A., 425; 28 Am. St. Rep., 268. State vs. Sperry & Hutchinson Co., 110 Minn., 378; 126 N. W., 120. State vs. Ramseyer, 73 N. H., 31; 58 Atl., 958. People vs. Gillson, 109 N. Y., 389; 17 N. E., 343; 4 Am. St. Rep., 465. People vs. Dycker, 72 App. Div., 308; 76 N. Y. Supp., 111. People vs. Zimmerman, 102 App. Div., 103; 92 N. Y. Supp., 497. Winston vs. Beeson, 135 N. C., 271; 37 S. E., 457; 65 L. R. A., 167. State vs. Dalton, 22 R. E., 77; 46 Atl., 234; 48 L. R. A., 775; 84 Am. St. Rep., 818. State vs. Dodge, 76 Vt., 197; 56 Atl., 983. Young vs. Commonwealth, 101 Va., 853; 45 S. E., 327. There are numerous similar decisions in the Federal Courts.

"The Court of Appeals of the District of Columbia, in its decisions in Lansburgh vs. District of Columbia, 11 App. D. C., 512, and in District of Columbia vs. Gregory, 35 App. D. C., 271, stands almost alone, although it has been followed by one or two Federal Judges, in reaching an opposite conclusion.

"The recent decision in Matter of Gregory, 219 U. S., 210; 31 Sup. Ct., 143; 55 L. Ed. —, has no bearing upon the question before us as the Judge who wrote the opinion was careful to put the decision upon grounds that have no relation to the validity of such provisions as those of this bill."

In Re: The Opinion of the Justices, 207 Mass., page 606; 94 N. E., 849.

SUPREME COURT OF CALIFORNIA HOLDS SUCH STATUTES CONTRARY TO CONSTITUTION OF THE UNITED STATES AND OF THE STATE.

In the cases of Ex-Parte Drexel and Ex-Parte Holland the Supreme Court of California sustained the contentions of the petitioners that such a statute was invalid and in violation of

the Fourteenth Amendment of the Constitution of the United States as well as in violation of the Constitution of the State of California. There is quite a full review of the decisions of the various Courts contained in said California case. The Court held in that case as follows:

> "We see nothing in such a stamp or coupon which is outside of the constitutional rights of citizens to make contracts concerning property, nothing which wrongfully interferes with the lawful rights of other persons, and nothing which the police power can reach as touching the public safety, the public health, or the public morals. Of course, contracts containing lotteries, advantages dependent upon chance, or any kind of gambling scheme, may be regulated or suppressed. But a trading coupon has none of these characteristics. It is not a lottery, its redemption does not depend upon chance; and it has no element of gambling of any kind. Its holder selects what goods he wants. He is not compelled to take what chance may give him, or to get nothing if the throw of the dice, or the event of some other gambling device, shall so determine. It is, therefore, a contract which under the principles above stated, the legislature has no constitutional power to prohibit, or to seriously interfere with under the guise of regulation; and as the act in question undertakes to do this, it is unconstitutional and void."
>
> Ex-Parte Drexel and Ex-Parte Holland, 147 California, 763; 82 Pac., 429; 2 L. R. A. (N. S.), 588.

THE COURT OF APPEALS OF NEW YORK HAS HELD SUCH STATUTES UNCONSITUTIONAL FOR REASONS VERY STRONGLY STATED.

Another leading case upon the subject is that of People vs. Gillson. The opinion of the Circuit Court of Appeals of New York, delivered by Mr. Justice Peckham, is a very clear and strong statement of the law upon the subject, and we make some quotations therefrom as follows:

> "The defendant here appeals for his protection to the

clause (among others) in the constitution which provides that no person shall be deprived of life, liberty, or property without due process of law. The meaning of this provision in our State Constitution has frequently been the subject of judicial investigation, and this Court has had occasion very recently to discuss it in quite a number of cases, and a further elaboration is not needed. The following propositions are firmly established and recognized. A person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty,' as used in the constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. These principles are contained and stated in the above languages in various cases, among which are Association vs. Crescent City Co., 1 Abb. (U. S.), 398; Slaughter-House cases, 16 Wall., 36-106; In re Jacobs, 98 N. Y., 98 (per Earl, J.); Bertholf vs. O'Reilly, 74 N. Y., 509 (per Andrews, J.); People vs. Marx, 99 N. Y., 377; 2 N. E. Rep., 29 (per Rapallo, J.). It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors, in the commercial, agricultural, manufacturing, or producing fields. By the provisions of this act a man owning articles

of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation. It is certainly lawful to sell (as in this instance) coffee. It is an article of food, and is almost one of the necessaries of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the Defendant in this case; and that, while his profits on the same amount of coffee sold would be smaller than if he gave no present, yet, by the growth of his trade, his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. He is thus restrained in the free enjoyment of his faculties, which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business, or occupation, unless such restraint is necessary for the common welfare. This law interferes with the free sale of food; for the condition is imposed that no one shall sell food, and at the same time, and as part of the transaction, give away any other thing. It is not material if, by reason of the prohibition, the owner's sales of food are greatly cut down, and his ability to support his family thereby, perhaps, largely decreased. If the law is valid, the fact of its existence is a complete answer to the complaints of the owner of food that his liberty to sell his property, and his chance to make a livelihood, are very greatly impaired. It cannot be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property, by curtailing his power of sale; and unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that

result, the legislation is invalid as plainly violative of the constitutional provision under discussion.

"This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the State. That power has never yet been fully described, nor its extent plainly limited, further, at least, than this: It is not above the constitution, but it is bounded by its provisions; and, if any liberty or franchise is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise, by the legislature or the executive, or the police power. The extent of this power has been the subject of discussion in this Court; and in the recent and most important case of In re Jacobs, 98 N. Y., 98, 107, the question was examined and most exhaustively reviewed by Earl, J., in his opinion. To reopen the subject now would be useless and I refer to that case as authority for the statement that the legislature cannot, w i t h o u t r e a s o n and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the Constitution of the State; and that, if the legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the Courts. The subject was again reviewed in People vs. Marx, 99 N. Y., 377; 2 N. E. Rep. 29, in an opinion written by Rapallo, J., and concurred in by the whole Court. In the Jacobs Case, supra, this Court held the tenement-house cigar act, so called, unconstitutional; and in the Marx Case, supra, the section of the act relating to the manufacture and sale of oleomargarine, which absolutely prohibited its manufacture and sale, was also held unconstitutional, inasmuch as it absolutely prohibited an important branch of industry, not injurious to the community, and not fraudulently conducted, solely for the reason that it competed with another branch. Under an exercise of the police power, the enactment must have reference to the comfort, the safety, or the welfare of society, and it must not be in conflict with the constitution. The law will not allow the rights of property to be invaded, under the guise of a police regulation for the protection of health, when it is manifest such

is not the object and purpose of the regulation. See Austin vs. Murray, 16 Pick. 121, 126; Com. vs. Alger, 7 Cush. 53, 84, cited with approval in Re Jacobs, supra. As is also said in the last case, it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety; and, if its measures are calculated, intended, convenient, or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be upheld as an exercise of the police power."

People vs. Gillson, 109 N. Y., 389; 17 N. E., 343, 345 to 347.

Another leading case is that of Hewin, et al., vs. City of Atlanta, decided by the Supreme Court of Georgia in 1905, in which the questions are fully discussed, and many authorities are cited and in which it was held as follows:

"1. An agreement between a number of merchants and a corporation provided that the latter should print the names of the former in its subscribers' directory, and circulate a number of copies of the book in a named city, and that the merchants should purchase of the corporation a number of so-called trading stamps, to be delivered to customers with their purchases (and not to be otherwise disposed of), and by them preserved and pasted in the books furnished by the corporation until a certain number had been secured, when they should be presented to the corporation in exchange for the customer's choice of certain articles kept in stock by the corporation.

"HELD: (1) That the furnishing of the trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling

merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or a legal sense. (2) That authority in a municipal charter 'to make just and proper classification of business for taxation,' and 'to classify business, and arrange the various businesses, trades and professions carried on in said city into such classes of subject for taxation as may be just and proper,' did not authorize the passage of an ordinance separating from the business of selling merchandise the incident of furnishing trading stamps for the purpose of increasing the sale of merchandise, and classifying the furnishing of such stamps as a separate business, subject to taxation. (3) That whether the furnishing of the trading stamps be treated as a gift, or as a part of the contract of sale of the merchandise, which is delivered at the time the stamps are furnished, the furnishing of the stamps does not constitute a business subject to be taxed under charter authority to classify and tax business. (4) That the word 'business,' in a commercial or legal sense, means something done or carried on for a livelihood, profit or the like. (5) That even if the General Assembly is authorized to impose a tax upon one who gives away his property, the giving away of property is not a business, within the meaning of a charter provision authorizing the taxation of business.

"(3) Persons against whom an unlawful exaction in the form of a tax is sought to be made may unite in an application for an injunction to restrain the collection of the tax, and are not compelled to pay the same, and brings separate suits against the tax officer for damages."

Hewin, et al., vs. City of Atlanta, 49 S. E., 765; 121 Ga., 731.

A leading case upon the subject, in which many of the authorities are cited, is the case of City Council of Montgomery vs. Kelly, decided by the Supreme Court of Alabama, in 1905 (38 So. Rep., 67-69; 142 Ala., 542), in which it was decided as follows, as shown by the headnote:

"A city ordinance requiring merchants giving trading stamps to pay a license fee of $100 in addition to that required of merchants engaged in the same business, but not giving trading stamps, is in contravention of Const. Section 1, providing that among the inalienable rights of citizens are life, liberty and the pursuit of happiness, and Section 35 declaring that the sole object of government is to protect the citizen in the enjoyment of life, liberty and property."

And the Court in the body of the opinion makes the following very clear and strong statement of the law, which fully establishes and specifically declares everything that we contend for in this case, and cites numerous cases in support thereof:

"The liberty which is so sedulously guarded by the Constitution of the United States and of this and other States comprehends more than the mere freedom from personal restraint. It included the right to pursue any useful and harmless occupation, and to conduct the business in the citizen's own way, without being discriminated against either by being prohibited from engaging in it or by being burdened with discriminative taxation. If it be allowed that an additional burden may be placed upon a merchant who chooses to advertise his business by offering a small gratuity to customers in the shape of these trading stamps, it would be equally lawful to place an extra burden on one who advertises his business in the papers, or one who offers, out of his own stock, a certain gratuity to every one purchasing goods to a certain amount, or one who erects a handsome sign in front of his store, etc. So long as his manner of conducting his business does not offend public morals, and work an injury to the public, it is his constitutional right to pursue, on terms equal to that allowed to others in like business, even though his methods may have a tendency to draw trade to him, to the detriment of competitors. Young vs. Commonwealth (Va.), 45 S. E., 327. State vs. Dalton, 22 R. I., 77; 46 Atl., 234; 48 L. R. A., 775; 84 Am. St. Rep., 818. People, ex rel., Madden vs. Dycker, 72 App. Div., 308; 76 N. Y. Supp., 111. People vs. Gillson,

109 N. Y., 389; 17 N. E., 343; 4 Am. St. Rep., 465. Long vs. State, 74 Md., 565; 22 Atl., 4; 12 L. R. A., 425; 28 Am. St. Rep., 268. Ex-Parte McKenna, 126 Cal., 429; 58 Pac., 916."

See City Council of Montgomery vs. Kelly, Sup. Court Ala., February 1st, 1905, 38 Sou. Rep., 67-69; 142 Ala., 542.

OTHER LEADING CASES HOLDING SUCH STATUTES UNCONSTITUTIONAL.

The following are some of the leading cases holding such statutes unconstitutional which are frequently cited:

Denver vs. Frueauff, 39 Colo., 20; 88 Pa., 389.
State vs. Dalton, 22 R. I., 77; 46 Atl., 238; 48 L. R. A., 775; 84 Am. St. Rep., 818.
State vs. Dodge, 76 Vt., 197; 57 Atl., 983.
State vs. Sperry & Hutchinson Co., 110 Minn., 378; 126 N. W., 120.
Young vs. Commonwealth, 101 Va., 853; 45 S. E., 327.
Winston vs. Beeson, 135 N. C., 271; 47 S. E., 457; 65 L. R. A., 167.
People vs. Zimmerman, 102 App. Div., 103; 92 N. Y. Supp., 497.
Ex-Parte McKenna, 126 Cal., 429; 58 Pa., 916.
State vs. Ramsayer, 73 N. H., 31; 58 Atl., 958.
State vs. Shugart, 138 Ala., 86; 35 So., 28; 100 Am. St. Rep., 17.
Long vs. Maryland, 74 Md., 565; 22 Atl., 4; 12 L. R. A., 425; 28 Am. St. Rep., 268.

CASES SUPPOSED TO SUSTAIN LEGISLATION AGAINST TRADING STAMPS, ETC.

So far as we are aware, there are but six cases holding legislation directed against the use of trading stamps to be constitutional in whole or in part, and three of these are cases

decided in the District of Columbia. These very few cases are opposed to the numerous and otherwise unanimous decisions of the Appellate Courts of many States. They are not only very few in number, but we submit will be found weak in reasoning. Even if those cases were correctly decided on the facts involved, they do not sustain the constitutionality of the Florida Statute, as we shall show more fully hereafter. Said cases supposed to sustain the validity of legislation against trading stamps are Lansburgh vs. District of Columbia, 11 Appellate D. C., 512. District of Columbia vs. Kraft, 35 App. D. C., 253; 30 L. R. A. (N. S.), 957. District of Columbia vs. Gregory, 35 App. D. C., 271. Humes vs. Fort Smith, 93 Fed., 857. State vs. Hawkins, 95 Md., 146; 51 Atl., 850. State of Washington vs. Pitney, 140 Pac., 918. Said last mentioned case is now before this Court on writ of error.

As above stated, these cases are opposed to the whole current of authority and as is said by the Supreme Court of California: "They are not of sufficient consequence to ruffle the great current of authority which runs the other way." Their correctness has been expressly denied by the Supreme Appellate Courts of many States. We quote below a few of such comments upon them made in leading cases in the Supreme Courts of different States.

The following is the statement concerning them made by the Supreme Court of California:

> "Respondent's counsel cite a few cases which, they contend, go directly to the subject of trading stamps, and support the validity of the act here in question, notably, State vs. Hawkins, 95 Md., 146; 93 Am. St. Rep., 328; 51 Atl., 850. Humes vs. Ft. Smith, 93 Fed., 857, and Lansburgh vs. District of Columbia, 11 App. D. C., 512. With respect to these cases, we do not deem it necessary to consider the suggestion of petitioners that they are distinguishable from the mass of cases above cited. Whatever they may hold, they are not of sufficient consequence to ruffle the great current of authority which runs the other way."

Ex-Parte Drexel, 147 California, 763; 82 Pac., 429; 2 L. R. A. (N. S.), 597.

The following is what the Supreme Court of Massachusetts says of said cases:

"The Court of Appeals of the District of Columbia, in its decisions in Lansburgh vs. District of Columbia, 11 App. D. C., 512, and in District of Columbia vs. Gregory, 35 App. D. C., 271, stands almost alone, although it has been followed by one or two Federal Judges, in reaching an opposite conclusion.

"The recent decision in Matter of Gregory, 219 U. S., 210; 31 Sup. Ct., 143; 55 L. Ed., —, has no bearing upon the question before us as the Judge who wrote the opinion was careful to put the decision upon grounds that have no relation to the validity of such provisions as those of this bill."

In re Opinion of the Justices, 207 Mass., 606; 94 N. E., 846, 849.

The Supreme Court of Colorado comments as follows upon said cases of Lansburgh vs. District of Columbia, 11 App. D. C., 512, and Humes vs. City of Ft. Smith, 93 Fed., 857:

"If the decision of that case is to be construed as announcing the doctrine that a legislative declaration that a business, lawful in itself, is a 'gift enterprise,' and is thereby rendered unlawful regardless of the fact that it wholly lacks the essential element of chance, it is at variance with the uniform current of authority, and if, as we understand it, the conclusion therein reached was because the scheme under consideration was, in the opinion of the Court, obnoxious to public morals or detrimental to the public welfare, we decline to follow it, because it is directly opposed to the conclusion reached as to its character in all the cases in which the business of the trading stamp company has been under investigation. Humes vs. City of Ft. Smith (C. C.), 93 Fed., 857, is similar to, and follows, the

Lansburgh case. We find no other case which, when carefully considered, supports the position assumed by plaintiff in error in this case."

City and County of Denver vs. Frueauff, 39 Colo., 20; 88 Pac., 389, 395.

These cases have been fully commented on and disapproved by the Supreme Court of Minnesota in the following case. State, ex rel., Simpson vs. Sperry and Hutchinson Company, 110 Minn., 378; 126 N. W., 120; 30 L. R. A. (N. S.), 966.

SAID DISTRICT OF COLUMBIA CASES AND OTHER CASES, EVEN IF CORRECTLY DECIDED, DO NOT SUSTAIN THE CONSTITUTIONALITY OF THE FLORIDA STATUTES.

Even if said cases cited as sustaining the constitutionality of such statutes were correctly decided, they do not sustain the constitutionality of the Florida Statute, but, on the contrary, the statements, arguments and admissions of the Courts in those cases show that even under such decisions and opinions the Florida Statute is unconstitutional.

Those cases only held that such statutes were constitutional where they applied to transactions wherein the trading stamps or the like were issued by and redeemable by a trading-stamp company, and where some element of chance was involved in determining what premium the purchaser would get. As we have shown, the Florida Statute attempts to impose these prohibitory so-called license taxes on transactions where the Florida merchant, himself, issues the coupon or profit-sharing certificate or the like and redeems it himself in a manner involving no element of chance or gambling, or where the manufacturer or shipper outside of Florida issues the coupon or profit-sharing certificate with his own goods and redeems it himself. As to these transactions, all the cases show that the statute is unconstitutional. The only other class of transactions covered by the provisions of the Florida Statute

in question is where the manufacturer or merchant outside of Florida puts a coupon or profit-sharing certificate in a package of his goods which he ships to Florida and such coupon or certificate is redeemable by some other party. But in that case the transaction, we submit, is clearly interstate commerce and the statute of Florida is unconstitutional in attempting to impose such burdens upon it or to so regulate it, as it does so attempt to do. Furthermore, if the act is unconstitutional as to the first two classes of cases, the provisions are so entire and inseparable that the whole is unconstitutional. We desire to make it clearly understood that we claim that all of the provisions are unconstitutional under the Fourteenth Amendment, as is shown by all the authorities except the very few cases above mentioned; but what we are arguing now is that **even if those few cases were correct, yet the Florida Statute is unconstitutional,** as above stated.

In the Lansburgh case the Court expressly limits its decision so as not to apply to our present case or the Florida Statute. The Court uses the following language:

> "We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course and practice of competitive business, or to determine just what character of inducements by way of gift or premium may and may not be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash or in proportion to amounts of purchases, when made by the merchant himself to his customers, may be regarded as certain, and the exercise of such power would doubtless be denied if expressly attempted. Nor can it with reason be said to apply to bona fide co-operative associations and the like. It is possible, also, that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain not attended with any element of chance, and where the gift is not the real object of the sale, in an attempt to evade acts regulating or prohibiting a particular traffic, as, for

example, in the case of Lauer vs. District of Columbia, 11 App. D. C., 453."

Lansburgh vs. District of Columbia, 11 App. D. C., 512.

In the Kraft case the Court uses the following language:

"Assuming that the statute does not apply in the case of bona fide co-operative associations, or of merchants making discounts or presenting actual articles directly to their customers, we fail to see that the co-operative association belongs in either class."

District of Columbia vs. Kraft, 35 App. D. C., 253; 30 L. R. A. (N. S.), 957, 961.

It is to be noted that in the Kraft case the Court of Appeals of the District of Columbia expressly says that none of the cases cited to sustain the doctrine of the Lansburgh case do sustain it, excepting the case of Humes vs. Fort Smith, 93 Fed., 857, which is merely the decision of one of the inferior Federal Courts following the Lansburgh case. The following is the language of the Court upon the subject:

"Of the cases cited on behalf of the District of Columbia, but one directly upholds the doctrine of the Lansburgh case which is quoted from and approved. Humes vs. Ft. Smith, 93 Fed., 857. State vs. Hawkins, 95 Md., 133; 93 Am. St. Rep., 328; 51 Atl., 850, does not involve the direct question presented here."

District of Columbia vs. Kraft, 355 App. D. C., 253; 30 L. R. A. (N. S.), 957, 962.

In the Gregory case the Supreme Court of the United States in no way passed upon or indicated any opinion upon the correctness of the decision of the Court of the District of Columbia. All that the Supreme Court decided was that the Police Court had jurisdiction in the case, and that the Supreme Court would not consider any other question. This Court uses the following language therein:

"The only question before us is whether the Police Court had jurisdiction. A habeas corpus proceeding can not be made to perform the function of a writ of error, and we are not concerned with the question whether the information was sufficient, or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the Court properly applied the law, if it be found that the Court had jurisdiction to try the issues and to render the judgment."

In the matter of Gregory, 219 U. S., 210; 56 L. Ed., 184, 189.

In the case above mentioned of Humes vs. City of Fort Smith, Arkansas, the matter involved was a license tax imposed upon a trading stamp or premium concern which was engaged in the business of selling stamps to certain merchants only of the city to be given by them to their customers with purchases and which were redeemed by the seller. As is seen, this case has no application to merchants or manufacturers issuing, offering or giving coupons, profit-sharing certificates or the like with their own goods, redeemable by themselves.

Humes vs. the City of Fort Smith, Arkansas, 93 Fed., 857.

In the Maryland case of State vs. Hawkins it was held that the Maryland Statute in question in that case was valid to the extent that it prohibited transactions into which the element of gambling entered, but it expressly recognized the law as established in the case of Long vs. State, 74 Md., 565; 22 Atl., 4; 12 L. R. A., 425; 28 Am. St. Rep., 268, that a statute prohibiting all gifts to purchasers of goods, wares or merchandise as inducements to make the purchases was invalid and could not be enforced in so far as it related to gift enterprises not involving chance. As the Bill of Complaint in our case shows and alleges fully and clearly and states the facts showing that there is no element of gambling or chance in the uses of coupons, profit-sharing certificates or the like mentioned in said bill and involved in this case, the said Maryland case of State vs. Hawkins does not sustain the validity of the Florida Statute, but, on the contrary, shows that it is unconstitutional.

State vs. Hawkins, 95 Md., 133; 51 Atl., 850; 93 Am. St. Rep., 328.

The only case that we know of in which a license tax on the use of trading stamps imposed by a statute was held valid wherein the decision considered in some aspects may be broad enough to cover the Florida Statute so far as its violation of the Fourteenth Amendment to the Constitution of the United States is concerned, although not covering or sustaining its violation of the interstate commerce clause of the Constitution of the United States, is the case of State vs. Pitney now before this Court on writ of error to the Supreme Court of the State of Washington. When the language of the opinion in that case is considered, however, it will be perceived that practically the only reason or grounud given for possibly sustaining the statute as an exercise of the police power, is that someone might practically force the use of trading stamps upon the merchants. Of course this could have no application to the provisions of the Florida Statute imposing the prohibitory so-called license taxes upon the issuance and redemption of coupons, profit-sharing certificates, etc., by the merchant or the manufacturer, himself, who issues and redeems his own coupons and certificates. As to the suggestion of the Washington Court that the use of such stamps might encourage indiscriminate purchasing by the people, we submit that it is too trivial to be considered a possible basis of legitimate or lawful exercise of the police power by the State. The same reasoning would apply to any form of advertising that would induce people to buy goods or to any form of inducement or discount by a merchant to his customers, and the Legislature would be equally justified in prohibiting a merchant from advertising in the newspapers or prohibiting a merchant from announcing that he had reduced his goods from a dollar to ninety-eight cents, and thereby inducing the ladies to flock to his store and buy more than they really needed. No Court anywhere except said Supreme Court of the State of Washington has ever indicated that in this country any legislature possesses any such arbitrary or unlimited power of interfering with, restraining or prohibiting private business. If that be the law, then the protection given to the citizen by the Constitution of the United States and by

the Constitution of his State in his liberty and in his property, amounts to nothing at all, for there is no business and no transaction for the restraint or prohibition of which some possible reason as fanciful, imaginary and trivial could not be supplied.

State vs. Pitney, Sup. Court of Wash., May 16th, 1914; 140 Pac., 918, 920.

STATEMENT OF JUSTICE PECKHAM CONCERNING THIS ARGUMENT.

The language used by Mr. Justice Peckham in delivering the unanimous opinion of the Court of Appeals of New York is very applicable to the suggestion of the Supreme Court of Washington that possibly people might be induced to buy more than they need by such coupons or profit-sharing certificates and it is especially covered by the declaration of the law by Justice Peckham that: "The argument is directed to that class of sumptuary legislation which, while good enough in some phases, is, when carried to minute details, simply unauthorized and illegal."

The portion of the opinion of the New York Court of Appeals delivered by Justice Peckham, above referred to, is as follows:

> "I lay no stress whatever upon the argument that this kind of transaction naturally induces people to purchase more than they want of any article of food, in order to get the other article with it which comes to them in the shape of a gift, and the poorer people are led to extravagance in outlay. It may be remarked that in purchasing articles of food, even if one purchase more than is then absolutely necessary, the food need not be, and in all probability is not, wasted. But, aside from that, the argument is directed to that class of sumptuary legislation which, while good enough in some phases, is, when carried to minute details, simply unauthorized and illegal. The right to legislate upon the subject of intoxicating liquors is acknowledged by every one, and is founded upon the fact that their use in excessive quantities leads, in large masses of cases, to crimes, poverty, and enormous suffering, and bears most harmfully upon the sum of the happiness of the human race. So in regard to

lotteries in general. A wide-spread custom of indulging in the purchase of tickets leads, among the poorer classes certainly, and also among others, to habits of recklessness, waste, and idleness. It cultivates a gambling spirit, and tends to a hatred of honest labor, and to a desire to obtain riches or money without the necessary expenditure of industrious energy. Many other instances could be given where the interference of the legislature with the personal liberty of the citizen would be at once regarded as proper, or at least legal, under the exercise of the police power. But there is a limit to such interference, in my judgment, and there does come a time when the constitutional provision, so often herein quoted, steps in to protect the citizen. As an act in furtherance of the public health or morals, no one, at this period of the history of man, would, I think, regard it as legal to enact, in this State (changing the verbiage to suit the altered condition of the race in this country), that no man or woman under the rank specified in the law shall thereafter wear fur on his or her clothes, or that no knight under the degree of lord should wear shoes or boots having pikes in them more than two inches long. A British parliament enacted such measures, to prevent, as was alleged, undue expenditures, and for the preservation of the morals of the people. See 2 Edw., 111, c. 1 (A. D. 1337); 3 Edw., IV, c. 5 (A. D. 1463). Numberless statutes of a similar nature have been passed both in England and in this country and it is generally admitted that some of the best legislation of both countries has been found in the repeal of laws enacted by former parliaments and legislatures. It seems to me that to uphold the act in question upon the assumption that it tends to prevent people from buying more food than they may want, and hence tends to prevent wastefulness, or lack of proper thrift, among the poorer classes, is a radically vicious and erroneous assumption, and is to take a long step backwards, and to favor that class of paternal legislation which, when carried to this extent, interferes with the proper liberty of the citizen and violates the constitutional provision referred to."

People vs. Gillson, 109 N. Y., 389; 17 N. E., 348-349.

THE IMPOSITION OF SAID LICENSE TAXES IS IN NO WAY A LEGITIMATE EXERCISE OF ANY POLICE POWER OF SAID STATE.

It is expressly alleged in the Bill of Complaint, and all the facts therein alleged specifically show that there is no element of gambling or chance in the use of said coupons or certificates, and that there is nothing in connection therewith, or in the use of the same, that is prejudicial to public health and safety, morals or welfare.

Also, that by the use of the same, the merchants are enabled to give a discount to purchasers, or to give additional value to purchasers in the shape of premiums, or articles sold for or exchanged for such coupons, slips, certificates, or the like, and that the purchasers of such articles or merchandise are substantially benefited thereby. Also these allegations are admitted on the record in the present status of this case.

> Bill of Complaint, paragraphs VI and VII, and paragraph XIV, subdivision K, Printed Record pages 11, 18.

The above propositions have been sustained by almost innumerable decisions of the Federal Courts and by the highest courts of very many States. It is really included in the main proposition, that there is no just or reasonable ground of classification and imposing the license taxes complained of upon merchants who use such coupons or the like, and not upon other merchants in the same line of business who do not use such coupons or the like, but advertise their business, or offer other inducements to purchasers, in some other way. Many of the cases heretofore cited fully sustain these propositions, and specifically decide that such statutes can not be sustained under the police power. All the decisions and opinions of this Court, including the numerous recent decisions upon the subject, hold and declare the law to be that the exercise of police power by a State, where it is alleged to conflict with the Constitution of the United States, is subject to review by this Court and to the decision of this Court as to whether or not it is constitutional and that the decision as to whether or not it violates the Fourteenth Amendment to the Constitution of the United States will depend upon whether the matter in question appears to be

a proper subject for the exercise of the police power, and whether the legislation in question appears to have a basis of reason and not to be merely arbitrary. We submit that we have fully and clearly shown that in the present case there is no sufficient basis of reason for the legislation and that there is no valid classification, but that the same is arbitrary and unconstitutional.

"Definitions of the police power must, however, be taken subject to the condition that the State can not, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

New Orleans Gas Light Company vs. Louisiana Light and Heat Producing and Manufacturing Company, 115 U. S., 650; 29 L. Ed., 516, 520.

"But the exercise of the police power is subject to judicial review, and property rights can not be wrongfully destroyed by arbitrary enactment."

Dobbins vs. City of Los Angeles, 195 U. S., 239; 49 L. Ed., 169, 176.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

"Classification to relieve a law from the charge of a denial of equal protection can not be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification."

Gulf, Colorado & Santa Fe Railway Company vs. Ellis, 165 U. S., 150-159; 41 L. Ed., 666-669.

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must never-

theless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

Cotting, et al., vs. Godard, as Attorney General of the State of Kansas, 183 U. S., 79, 103, 104, 112; 46 L. Ed., 92, 106, 109, 110.

"The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Barbier vs. Connolly, 113 U. S., 27, 31; 28 L. Ed., 923, 924.

"The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred

dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment that such attempted taxation under a statute of the State does violence to the Federal Constitution."

Southern Railway Co. vs. Greene, 216 U. S., 400, 412, 417, 418; 54 L. Ed., 536, 539, 541, 542.

THE DECISIONS OF THE SUPREME COURT OF FLORIDA ESTABLISH ALSO THAT THE COURTS ARE THE FINAL JUDGES OF THE VALIDITY OF SUCH LEGISLATION AND THAT SUCH PROVISIONS AS ARE CONTAINED IN THIS STATUTE ARE INVALID UNDER THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF FLORIDA.

It may be noted also that the Supreme Court of Florida has declared and enforced the doctrine that the Courts are the final judges of what are the proper subjects for the exercise of the police power, and the constitutionality of such laws. And has also held that such classifications as we submit we have shown are involved in this case are in violation of the Constitution of the United States and the Constitution of the State of Florida.

"The Courts are the final judges as to what are proper subjects of the police power, and the law-making power can not arbitrarily make that a subject of its exercise which, from its nature, is not one."

City of Jacksonville vs. Ledwith, 26 Fla., 165.

"3. The legality of classifications adopted for legislative regulation may be determined with reference to the due

process of law provision of the State Constitution; but as such determination involves a Federal question the decisions of the Supreme Court of the United States control."

"4. Classifications adopted for legislative regulation should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary; and all similarly situated or having similar legal duties and obligations in regard to the subject regulated, should be included in one class, at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare."

Seaboard Air Line Railway vs. Abe. Simon & Co., 56 Fla., 545; Fla. Reports, 56, 1908.

COUNSEL FOR APPELLANTS IS ENTIRELY MISTAKEN AND THE STATEMENTS OF HIS BRIEF ARE DIRECTLY CONTRARY TO THE RECORD WHEREIN IT STATES THAT THE RETAIL MERCHANT IS NOT OPPOSING THIS STATUTE AND IS NOT MAKING THE FIGHT TO OVERTHROW IT AND ALSO THAT THERE MAY BE SOMETHING IN THE USE OF SUCH COUPONS, PROFIT-SHARING CERTIFICATES, ETC., INJURIOUS TO THE CONSUMER.

Counsel for Appellants says that "While not in the record in this case it is nevertheless true that the retail merchant is not opposing this statute and is not making the fight to overthrow it," etc.

See Brief of Appellant, pages 30, 31.

These assertions show the danger of attempting to state matters not in the record, for, in point of fact, it is not only not in the record, but it is positively opposed to the record and the statements are, in fact, erroneous. This Bill of Complaint was brought by merchants of various classes located and doing business in the State of Florida and the retail merchants are

fully represented in said Bill of Complaint and suit brought, in the parties to the suit and in opposing the statute. Of the six Complainants, two, the Harkisheimer Company of Jacksonville, Florida, and Joseph R. Mickler of Tampa, Florida, are exclusively engaged, respectively, in the business of a retail merchant doing a retail grocery business; two of said Complainants, namely, the J. S. Pinkussohn Cigar Company and the Forsyth Company, are retail, as well as wholesale, tobacco merchants.

See Bill of Complaint, paragraph 1, Printed Record pages 5 and 6.

In view of the statements of the brief for Appellants and their contradiction of the facts positively shown by the record we submit that it is not improper to say that some of the most strenuous opposition to said statute has come from retail merchants.

In fact the retail merchant is the merchant who is most adversely affected by the statute, because, as is shown by the Bill of Complaint and the authorities cited in our brief, and in fact as seems to be hardly disputed by counsel for Appellants, the business of the manufacturers shipping into the State, and the wholesale merchants is protected by the interstate commerce clause of the Constitution of the United States; and practically the only contention of counsel for Appellants seems to be that in the business wherein the Florida merchant, himself, issues and redeems or pays coupons, profit-sharing certificates, cash register slips and the like, the imposition of such license tax is within the power of the State, as it is intrastate commerce. It is manifest that the retailer is especially the man who would be hit and injured by this.

As to the other statements of the brief, as to the consumer making additional payments for the expenses of carrying on the coupon business, etc., there is not only no basis shown therefor and no answer or evidence in the record to base such assumptions on, but they are contrary to the express statements of the facts set out in the Bill of Complaint and admitted

for the purposes of this argument. The Bill of Complaint contains the following express statements and allegations among others:

> "That by the use of the system of delivering such coupons, slips, certificates or other tokens with merchandise sold, the merchant is enabled to give a discount to purchasers or to give an additional value to purchasers in the shape of the premiums or articles sold for or exchanged for such coupons, slips, certificates or other tokens, and the purchasers of such articles of merchandise are substantially benefited thereby."
>
> Bill of Complaint, paragraph VI, Printed Record page 11.

Furthermore in view of said statements of Appellants' brief we think it proper to add, what we do not think the Attorney General will deny, namely, that said license taxes complained of were enacted without any demand for same by the public, without any notice to the public, and that they have no support of public sentiment in Florida.

It is furthermore to be noted that all the cases and decisions, without exception, and including the District of Columbia cases, and all the cases cited by Appellants, excepting the case of State of Washington vs. Pitney, now before this Court on writ of error, hold or admit that a statute imposing such a license tax on account of the issuance and redemption of such coupons, profit-sharing certificates, etc., by the merchant himself, without the intervention of a trading-stamp or premium company, is unconstitutional and invalid. And it is to be especially noted in this connection that the only provision of the Florida Statute which, according to the allegations of bill concerns intrastate commerce, is the tax on a merchant issuing and redeeming his own coupons, profit-sharing certificates, etc., as to the unconstitutionality of which there does not appear to be any doubt at all, according to the decisions of the Courts. The Bill of Complaint shows this and we submit that the brief

of Appellants practically admits it. We have stated and reviewed these decisions elsewhere in this brief.

FREQUENCY OF ATTEMPTS AT SUCH LEGISLATION DOES NOT SUSTAIN ITS CONSTITUTIONALITY.

Counsel for Appellants argues that because it appears from the decided cases that there have been frequent attempts to enact legislation attempting to prohibit or to impose heavy license taxes on the use of trading stamps or the like, that that is evidence or ground for holding that the provisions of the Florida Statute complained of are a proper and constitutional exercise of the police power of the State. We submit that there is no basis for such an argument when it appears that in every case in the United States in which the question has arisen excepting, perhaps, the case of State of Washington vs. Pitney, now before this Court on writ of error, such legislation as is contained in the Florida Statute has been held to be unconstitutional. That there have been frequent attempts at such legislation only indicates that the use of such stamps, coupons, profit-sharing certificates and the like is a successful method of inducing and enlarging trade and business, and that the people like it and will patronize the merchants who use it, and that the influence of narrow and illiberal persons who do not wish to give premiums or discounts to customers has been able from time to time to get such statutes into and through some Legislatures. It is not difficult in a statute, like the Florida Statute, for instance, containing over fifty pages of provisions for license taxes, for a person who is unwilling to get or increase business by liberal and beneficial inducements, such as discounts, profit-sharing, premiums and the like, to get this kind of legislation either by political influence or by getting it slipped through in such an omnibus bill, without any public demand therefor and without any consideration of the public welfare, and against the wishes of the people, so as to use the legislative power to arbitrarily prevent legitimate and beneficial methods of doing business by competitors. The frequency of such occurrences only demonstrates the dangers of such legislation and the necessity of the Courts protecting the people and protecting individuals against such abuses of legislation

and in their constitutional rights. As we have said before, one of the greatest duties that now presses upon the Courts is the necessity of providing safeguards against such abuses of legislation whereby advantage is taken of the spirit of the times and the trend of legislation in extending the scope of police and governmental powers to abuse such powers by arbitrary and unconstitutional legislation, aimed to deprive certain persons or classes of persons of legitimate and lawful rights and to give undue and unjust advantages to others. This legislation is indeed truly and clearly characterized by Mr. Justice Peckham as follows:

> "It is evidently of that kind which has been so frequent of late—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the Legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors, in the commercial, agricultural, manufacturing, or producing fields."
>
> People vs. Gillson, 109 N. Y., 389; 17 N. E., 343, 345 to 347.

SAID PROVISIONS OF SAID STATUTE OF FLORIDA ARE CONTRARY TO AND IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The objections to said statute indicated in the above heading, namely, that it violates the commerce clause of the Constitution of the United States, is stated in the Bill of Complaint as follows:

> "(1) That said statute in the said enactments and provisions thereof undertakes and attempts to and if it be permitted to be enforced or given effect will regulate, hinder, restrain, prohibit and destroy interstate commerce between the several States of the United States, to-wit: between States of the United States other than the State

of Florida and the said State of Florida contrary to and in violation of the commerce clause of the Constitution of the United States, to-wit: the third clause of Section 8 of Article I of the Constitution of the United States of America."

Clause (1) of paragraph XIV of Bill of Complaint, Printed Record page 16.

The facts upon which this ground of objection is based are stated fully and in detail in paragraphs II, III, V, VI and XII of the Bill of Complaint, Printed Record pages 6-10, 11, 13-15.

As will be seen by the specific allegations of the Bill of Complaint, and especially those in the paragraphs last above cited, and particularly in paragraph III of the bill, the coupons, certificates or the like, are transmitted from the manufacturers or shipper from out of the State of Florida, to the ultimate purchaser of the package containing same in the State of Florida, through a merchant or a wholesale merchant and a retail merchant in the State of Florida, and when a certain number of such certificates, coupons or the like are accumulated by such ultimate purchaser in the State of Florida, he returns them to the manufacturer or shipper outside of Florida, and informs him what premium or article he desires to receive therefor, which article is sent by such manufacturer or shipper from outside of the State of Florida to such ultimate purchaser inside the State of Florida.

A part of the statement of the methods used in the premises, contained in paragraph III of the Bill of Complaint, is as follows:

"That the manner or method of disposing of and redeeming, taking up or paying such coupons, slips, certificates or other tokens is that the same are enclosed in packages or the wrappers thereof or a part of the wrappers thereof, such packages are put in boxes, cases or other receptacles or enclosures and shipped by the manufacturer or producer from his place of business out of the State of Florida, as aforesaid, to the merchant in the State of Florida, generally

to a wholesale merchant or jobber, and such boxes, cases or enclosures containing such packages with coupons, certificates or the like, as aforesaid are received by the wholesale merchant or jobber in Florida and sold to the retail merchant in said State. The retail merchant generally opens the said boxes, cases or enclosures containing such packages with coupons, certificates or the like, and sells them to his customers. The customer takes such coupons, certificates or the like out of such articles or packages, or from the wrappers thereof, and when he has accumulated a sufficient number of them to entitle him to receive a premium or article or payment therefor, according to some list, catalogue or rules, promulgated by the manufacturer or the producer making or shipping the articles from without the State of Florida, he sends such coupons, certificates or the like to such manufacturer, producer or original shipper of the article, out of the State of Florida, or, in some instances, to a company or agency in some State of the United States outside of the State of Florida, and such coupons, certificates or the like are redeemed or paid or the article which such purchaser has selected from such list, catalogue or the like is sent to him in consideration of and for such coupons, certificates or the like, or for the same and a postage stamp or stamps, or a small sum of money in addition thereto. In all such cases the coupons, slips, certificates or tokens are put in the articles or in the wrappers thereof, or a part of the wrappers thereof, by the manufacturer, producer or shipper in a State of the United States, outside of the State of Florida, and shipped into the State of Florida, to be delivered by the merchant in Florida selling the articles to the purchaser thereof, and entitling the purchaser thereof, upon a contract, agreement, or sale made to him by the manufacturer, shipper or producer outside of the State of Florida, that upon such purchaser buying such merchandise, made, shipped or sold by such manufacturer, shipper or producer, outside of the State of Florida, and shipped into Florida, as aforesaid that upon return by such purchaser of a certain number of such coupons, certificates or the like to such manufacturer, producer or shipper, in a State of the United States outside of the State of Florida, or upon the return of such coupons, certificates

or the like with the addition of a postage stamp or stamps or a small sum of money, that such manufacturer or producer will sell or exchange therefor some article of merchandise of value selected by such purchaser from a list or catalogue, as aforesaid, and will ship or send such article from such place outside of the State of Florida to such purchaser in the State of Florida."

Printed Record, 7-10.

We submit that it is clear that so far as the wholesale merchant in Florida is concerned, who received the original box or case and sells to the retailer the same box or case unbroken, that the transaction is interstate commerce and he is not subject to the Florida license tax law which requires him to pay license taxes for each other person, firm or corporation who may redeem any coupon, certificate, etc., offered with such merchandise bargained and sold, etc.

Furthermore, we submit, that when the decisions of the Supreme Court of the United States and other Federal Courts are examined and applied to the transaction, it is also clear that the offering or delivering to purchasers by the retailer, of such coupons, certificates or the like, with the articles of merchandise, is equally interstate commerce and not subject to the payment of said license taxes attempted to be imposed by the State of Florida.

The question involved is not whether the physical package of merchandise remains a part of interstate commerce in the hands of the retailer who opens the larger case and takes and sells therefrom the small packages contained therein, but whether the coupon or certificate or the like which the manufacturer or shipper has put in the package in New York, for instance, and sent to be delivered to the ultimate purchaser of the package in Florida and the transactions concerning the same are interstate commerce. Such shipper in New York sends out such coupon or wrapper in or on the package to advertise his interstate business, and to increase the popularity and sales of his goods, etc., and such manufacturer or shipper in New York merely transmits such coupons or wrappers through the wholesale and the retail merchants in Florida as his agencies or means of distributing or delivering the same to

the ultimate purchaser in Florida, and such manufacturer or shipper in New York thereby offering to such ultimate purchaser, and agreeing with him, that upon the return of a certain number of coupons, signatures or the like, or the return of the same with a postage stamp, or a small sum of money, to such manufacturer or shipper in New York, that he will sell or deliver to such ultimate purchaser, in consideration of the same, a certain article of value, in New York; the return of such coupons or the like being made from Florida to New York by the ultimate purchaser, and the premium or article acquired thereby being shipped from New York to the ultimate purchaser in Florida. **We submit that clearly this transaction and the coupons, is a distinct transaction from the mere sale of the merchandise in the package by the Florida merchant, and is in all stages interstate commerce.**

The Florida merchant has nothing to do with the coupon except to act as the medium or agency of delivery from the manufacturer or shipper in New York or elsewhere out of the State of Florida, to the purchaser in Florida. The manufacturer or shipper in New York sends or tenders and delivers through such medium or agency directly to the purchaser of the package in Florida, such coupon or the like, tendering and delivering to such ultimate purchaser the offer, agreement and obligation of such manufacturer or shipper in New York, that upon the return to such manufacturer or shipper in New York of a sufficient number of such coupons or of such coupons and a postage stamp or stamps, or a small sum of money, as above mentioned, that such manufacturer or shipper in New York will sell or deliver in exchange therefor to such ultimate purchaser in Florida, such article to be shipped from New York to Florida, as aforesaid. The Florida merchant makes no promise to the purchaser concerning the coupon, incurs no liability concerning it in its return course to New York, does not receive or deliver the premium or article sold or given in exchange therefor, and has nothing at all to do with it, it being transmitted in the package of merchandise from the manufacturer or shipper in New York to the ultimate purchaser in Florida, and sent back by such ultimate purchaser in Florida to such manufacturer or shipper in New York, who sends back to the ultimate purchaser in Florida the premium or article. Therefore, as stated, it is an instrumentality where-

by the manufacturer or shipper in New York advertises and offers inducements to increase the amount of the sales of his merchandise in interstate commerce, and, we submit that under the decisions of the Supreme Court of the United States, no license taxes can be collected from the Florida merchant because of the fact that such a coupon is contained in the package or in the wrapper thereof.

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ESTABLISH THAT ABOVE TRANSACTIONS AND SAID COUPONS, ETC., ARE INTERSTATE COMMERCE, NOT SUBJECT TO STATE TAXATION.

The decisions of the Supreme Court of the United States, we submit, clearly establish that the transactions above mentioned, and the coupons, certificates, slips, etc., used as above mentioned are interstate commerce and that said licenses concerning the same, or the offering of the same with goods or merchandise, are unconstitutional taxes on interstate commerce. The decisions of the Supreme Court of the United States to that effect are so very numerous, that we can not undertake to cite them all, nor does it appear to be necessary to attempt to do so. We will cite some of the leading cases wherein the decisions are particularly applicable to this case. Many other decisions of the Supreme Court are referred to by said Court in these cases cited.

In Champion vs. Ames it was held, that lottery tickets and lottery advertisements transmitted from one State to another, is interstate commerce, and comes under the commerce clause of the Constitution of the United States. This case is exceedingly analogous to the present case. In fact the present case is stronger, for the lottery tickets or advertising concerning the same, only dealt with a certificate or papers concerning a transaction that might result in the holder getting an article of value from another State or foreign country, but might not result in anything of the sort, whereas in our case, the coupons are not only elements of interstate commerce, but by acquiring

a fixed number of them the holder is certainly entitled to get a valuable article to be shipped to him in the course of interstate commerce.

Champion vs. Ames, 188 U. S., 321; 47 Law Ed., 492.

In the case of Dozier vs. State of Alabama where each portrait ordered was to be delivered in an appropriate frame which frame the purchaser had the option to accept or not as he might choose to do and the pictures and frames were shipped into the State of Alabama from another State and remained the property of the shipper until paid for and delivered, it was held that the transaction was interstate commerce on which the State of Alabama could not interpose a license tax. The language of this Court in that case is peculiarly applicable to this case. It is to be noted that in the Alabama case this Court expressly said that the sale took place wholly within the State of Alabama, if a sale was made, and yet that the offer of the frames sent with the portraits from another State and the final acceptance by the purchasers in Alabama and the delivery to them of the frames was interstate commerce, just as we submit in our case the placing by a manufacturer in New York of a coupon in a package of merchandise to be delivered to the final purchaser and consumer in Florida, offering to that person that if he will buy a certain number of packages of said manufacturer's goods and take the coupons out of the same and return them to the manufacturer in New York, that said manufacturer will ship from New York to such ultimate purchaser or consumer a certain premium which the purchaser shall have the right to select from a catalogue furnished by the manufacturer is equally interstate commerce and the section of said statute attempting to impose a license tax thereon is in violation of the commerce clause of the Constitution of the United States and is invalid.

Dozier vs. State of Alabama, 218 U. S., 124, 127, 128.

These principles have been reiterated and enforced by this Court in still more recent cases.

Crenshaw vs. State of Arkansas, 227 U. S., 389; 57 L. Ed., 565.

Stewart vs. State of Michigan, 232 U. S., 665; 58 L. Ed., 786.

In Caldwell vs. North Carolina, the Supreme Court of the United States held that an ordinance under which a license tax might be required from an agent of a non-resident portrait company, was unconstitutional, being in violation of the commerce clause of the Constitution of the United States. In that case, the agent was in Greensboro, North Carolina. The portraits were shipped to him there from Chicago, by the Chicago Portrait Company, the pictures and the frames being packed in bulk in large cases, or packages, and the agent broke open these large original packages in Greensboro, took out the pictures and the frames, put each picture in a frame, and then delivered each picture to a person in North Carolina who had sent an order for a picture to the company in Chicago.

We submit that in principle this was precisely such a cause as ours. In the course of the opinion, the Supreme Court says:

"But it certainly can not be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the State, or on the purchaser within the State. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the State.

"Nor does the fact that these articles were not shipped separately, and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character of interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself, or by a personal agent, had carried

and delivered the goods to the purchaser. That the articles were sent as freight by freight and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

"Transactions between manufacturing companies in one State, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the Court below, that the same articles, if sent by rail directly to the purchaser, are free from State taxation, but, if sent to an agent to deliver, are taxable, through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.

"It can not escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this Court. The cases hereinbefore cited disclose the truth of this observation."

Caldwell vs. North Carolina, 187 U. S., 622, 631, 632, 633; 47 L. Ed., 336, 341.

In the case of Lyng vs. Michigan, the Supreme Court uses the following language:

"We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

Lyng vs. Michigan, 135 U. S., 161; 34 L. Ed., 150; 3 Inters. Com. Rep., 143; 10 Sup. Ct. Rep., 725.

In Crutcher vs. Kentucky the Supreme Court stated clearly also the principle entirely applicable in our case, that a State statute requiring a license that would affect interstate commerce, could not be sustained upon the contention that it was a police regulation. The Court says:

> "The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of State regulation, can be imposed upon interstate, any more than upon foreign, commerce; and that all acts of legislation producing that result are, to that extent, unconstitutional and void."
>
> Crutcher vs. Kentucky, 141 U. S., 47; 35 L. Ed., 649; 11 Sup. Ct. Rep., 851.

It has been held by the Supreme Court of the United States in innumerable cases, including the case above cited, and the cases cited by them, and from the original case of Brown vs. Maryland, decided by Chief Justice Marshall, down to the present time, that an occupation tax or other tax, imposed because of any transaction, or the selling of anything, or the doing of anything, which is interstate commerce, is a tax on interstate commerce, and in violation of the Constitution of the United States, and it is immaterial who is required under the statute to pay the tax.

Brown vs. Maryland, 12 Wheat., 444.

In the case of Champion vs. Ames, heretofore cited, wherein the Supreme Court held that lottery tickets and the advertisements of lotteries were interstate commerce, coming under the commerce clause of the Constitution, the opinion of the Court is so illuminating and so applicable to this case,

and there is such a full citation therein of other decisions of the Supreme Court of the United States upon the subject, that we do not think that we can present the matters in this brief as well in any way as by incorporating some quotations from that opinion. The Supreme Court cites the following cases and uses the following language:

"In Western U. Teleg. Co. vs. Pendelton, 122 U. S., 347, 356; 30 L. Ed., 1187, 1188; 1 Inters. Com. Rep., 306; 7 Sup. Ct. Rep., 1126, the Court recognized the commerce with foreign countries and among the States which Congress could regulate as including not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence. See also Ratterman vs. Western U. Teleg. Co. 127 U. S., 411; 32 L. Ed., 229; 2 Inters. Com. Rep., 59; 8 Sup. Ct. Rep., 1127, and Leloup vs. Port of Mobile, 127 U. S., 640; 32 L. Ed., 311; 2 Inters. Com. Rep., 134; 8 Sup. Ct. Rep., 1380.

"It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test of what are to be deemed subjects of the commerce that may be regulated by Congress, we can not accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold, and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have not been able to enforce his claim in the Courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes

affixed to them. Even if a holder did not draw a prize, the tickets, before drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the Act of 1895. 28 Stat. at L., 963, U. S. Comp. Stat., 1901, p. 3178. The fact is not without significance in view of what this Court has said. That act, counsel for the accused well remarks, was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and prohibiting the importation of lottery matter from abroad, and to prohibit the act of causing lottery tickets to be carried and lottery tickets and lottery advertisements to be transferred from one State to another by any means or method."

Champion vs. Ames, 188 U. S., 321, 351, 352, 353, 354; 47 L. Ed., 492, 499, 500.

THE PROVISIONS OF SAID STATUTE IMPOSING THE LICENSE TAXES WHICH COVER INTERSTATE COMMERCE BEING VOID, ALL SAID COUPON LICENSE TAX PROVISIONS ARE VOID.

We think it so clear that all of said coupon license tax provisions are in violation of the Fourteenth Amendment of the Constitution of the United States, including those that apply to commerce within the State as well as those that apply to interstate commerce, that we have really felt that it was unnecessary to state the objections or to discuss the points beyond the ground that the classification attempted was arbitrary and illegal, and that all said coupon license taxes were void as violating said Fourteenth Amendment, but we think also that it is clear that as to all said coupon goods shipped into Florida from other States, that it is void as violating the commerce clause of the Constitution of the United States. And futhermore, we submit, that if it is unconstitutional in that respect, all the provisions are unconstitutional because they are so closely connected, and because it is apparent that the Legislature of Florida undertook to impose these coupon license taxes as a whole and as one entire scheme, and they are too closely connected to be separable, and that it can not be

presumed that they would have enacted such provisions to apply only to commerce within the State or to coupons issued by and redeemed by merchants within the State and not to apply to coupons or like tokens issued or inserted by and redeemed by persons without the State. That the Florida Legislature would not impose a tax which in effect would discriminate against the Florida merchants, not being applicable to or enforceable against such persons or merchants outside of Florida. Both the Supreme Court of Florida and the Supreme Court of the United States have held that under such circumstances the invalidity of one portion of the provisions of the statute will invalidate the whole.

"2. The settled rule of statutory construction is that if the obnoxious section or part is of such import that the other sections or parts without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative."

State vs. Patterson, 50 Fla., 128, Head Note 2.
Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 565; 46 L. Ed., 679, 692.
Leloup vs. Port of Mobile, 127 U. S. 640; 32 L. Ed., 311.
Harrison vs. St. Louis & S. F. R. Co., 232 U. S., 318.

"The rule as to statutes is that part of an act may be unconstitutional without invalidating the whole of it. If all the provisions are connected in subject matter depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it can not be presumed that the Legislature would have passed the one without the other, the whole act will be declared void."

City of Jacksonville vs. Ledwith, 26 Fla., 212.

SAID SECTION OF SAID STATUTE REQUIRES EACH OF COMPLAINANTS AND EVERY PERSON SIMILARLY SITUATED TO PAY THE LICENSE TAXES OF OTHER PERSONS, FIRMS OR CORPORATIONS.

One of the objections to said section of said statute, and one of the grounds of unconstitutionality, which is indicated by the above heading, is specified in sub-division (D), of the Bill of Complaint. Printed Record page 17. One of the provisions of said section of said statute is as follows:

> "And no person, firm or corporation shall offer with merchandise, bargained or sold as aforesaid, any coupon, profit-sharing certificate or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation than the one offering the same without paying the above license for each other person, firm or corporation who may redeem the same."

We submit that this clearly is an attempt to make one man pay the debt or license or tax of another, and to take or seize the property of one man, or to fine and imprison him, in order to compel him to pay a license or tax for some one else. This is so clearly in violation of the Fourteenth Amendment of the Constitution of the United States that we submit that the proposition requires no extended argument or numerous citation of authorities.

> "The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public."
>
> Reagan vs. Farmers Loan & Trust Company, 154 U. S., 399; 38 L. Ed., 1024.

One man can not be required to pay taxes for another,

nor can his property be levied on or sold to enforce collection of taxes for another.

Brown vs. Snell, 6 Fla., 741, 745-6.

SAID STATUTE ATTEMPTS TO DEPRIVE COMPLAINANTS, AND ALL OTHER PERSONS IN LIKE SITUATION, OF THE RIGHT TO BESTOW A GIFT OR GIVE A PREMIUM OR SHARE OF PROFITS OF BUSINESS, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Subdivision (E) of objection to said statute, and grounds of unconstitutionality is as follows:

> "That said statute by its said provisions and said license taxes hereinbefore complained of, deprives Complainants and each of them, and every other person, firm or corporation in like situation, of their privileges, immunities and liberty and property, without due process of law, inasmuch as they or any of them can not bestow a gift or give a premium, or a share of the profits of the business of each or any of them, by reason of the said provisions of the said statute, hereinbefore set forth, without paying said enormous, excessive and prohibitory license tax, whereby they are hindered, restrained and prevented from so doing, exercising, having and enjoying privileges, immunities, liberty and property, guaranteed and secured to them and each of them by said Article XIV of the Constitution of the United States of America."
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> Bill of Complaint, Printed Record page 17.

We submit that this objection is well taken and supported by a multitude of authorities, many of which have been already cited.

BY SAID PROVISIONS OF SAID STATUTE FINES SO GREAT AND IMPRISONMENT SO SEVERE ARE FIXED FOR NONPAYMENT OF SAID LICENSE

TAXES AS TO INTIMIDATE COMPLAINANTS FROM CONTINUING TO DO BUSINESS AND TESTING THE VALIDITY OF SAID STATUTE IN A COURT OF LAW AND THEREFORE SAID PROVISIONS OF SAID STATUTE ARE UNCONSTITUIONAL.

An additional and distinct ground of unconstitutionality of said provisions of said section of said statute concerning such license taxes is indicated in the foregoing heading. Legislation imposing burdens upon the business of a person or corporation and fixing such heavy penalties for disobedience by fines and imprisonment as to intimidate such person or corporation from continuing to do such business in such manner and resorting to the Courts to test the validity of such impositions or provisions are unconstitutional upon that distinct ground apart from the other grounds of unconstitutionality. The propositions are stated in the Bill of Complaint in subdivisions (L) and (M) as follows:

> "(L) That the penalties, fines and imprisonment provided in said section of said statute for the enforcement thereof, are so onerous, drastic and excessive and numerous, as to deter complainants from going on doing business in the premises as they have heretofore done, with reference to such coupons, slips, certificates, evidences of indebtedness and tokens as aforesaid, and testing the validity of said statute and the provisions thereof in a Court of Law.
>
> "(M) That the fines and penalties imposed by said provisions of said statute complained of, for the violation thereof, are so excessive and exorbitant as to be confiscatory of the property of said Complainants and each of them, were they or either of them to continue to carry on their businesses and to offer, sell or dispose of goods of merchandise with coupons, slips, certificates, evidences of indebtedness and such tokens, as aforesaid, for the purpose of testing the validity of the same in a Court of Law and should said law be held to be valid."
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> Bill of Complaint, Record pages 18-19.

As has been shown in the Bill of Complaint each of these Complainants offer with merchandise which they sell, or deliver with the same, such coupons, certificates or the like redeemable by many other persons or corporations and divers of them offer or deliver coupons or certificates issued by and redeemable by themselves. The aggregate fines and imprisonments under these circumstances would be enormous and beyond all bounds of reason, aggregating many thousands of dollars of fines and many years of imprisonment. See II, III, IV, V and XII of the Bill of Complaint. Printed Record pages 6-10, 13-15.

That the provision for imposing such heavy and intimidating fines or imprisonment in such a case as this is in itself a distinct and sufficient ground of unconstitutionality as violating the Fourteenth Amendment to the Constitution of the United States has been fully decided by the Supreme Court of the United States.

Ex-Parte Young, 209 U. S., 123, 148; 52 L. Ed., 714, 724.

> "The provision of such statutes subjecting any gas company furnishing or selling gas in the city of New York to a penalty of $1,000 for every violation of their provisions respecting equipment, pressure, or rates of charge therein fixed is extravagant and unreasonable in its severity, and renders such statutes unconstitutional and void as a denial to such companies of the equal protection of the laws."
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> Consolidated Gas Company vs. City of New York, 157 Fed., 851.

UNJUST AND ARBITRARY DISCRIMINATION WITHOUT ANY BASIS OF REASON AND DENIAL TO COMPLAINANTS OF EQUAL PROTECTION OF THE LAWS CONTRARY TO THE FOURTEENTH AMENDMENT IS FURTHER SHOWN BY GROSSLY DISCRIMINATING PENALTIES.

The purposes of the section of the statute complained of and the lack of any reason for its classification and discrimination and also the intent to discriminate against these Complainants and those in like situation and to deprive them of

the equal protection of the laws is made still further manifest by the fact that while the penalties imposed by said statute generally is only a fine of not more than double the amount of the required license, that under said section thirty-five the penalties provided are fine not exceeding one thousand dollars or imprisonment in the county jail not exceeding six months; there being no provision or punishment by imprisonment provided for the non-payment of license taxes generally. See copy of said section thirty-five hereinbefore printed and Record 40-41. Also sub-division (N) of Bill of Complaint. Record, page 18.

> "(N) That by said statute and in Section 59 thereof, it is provided and enacted as to persons, firms or corporations generally that shall carry on or conduct any business or profession for which a license is required, without first obtaining such license, that such person, firm or corporation shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than double the amount required for said license, but in said Section 35 it is provided and enacted that for failure to pay any of the license taxes hereinbefore mentioned and complained of, any person, whether acting for himself or as the agent for another, may be imprisoned in the county jail, not exceeding six months."

SAID PROVISIONS OF SAID STATUTE AMOUNT TO CONFISCATION OF THE GOODS COMPLAINANTS HAVE ON HAND WITH INSERTS OF COUPONS, CERTFICATES OR THE LIKE.

It is shown by the Bill of Complaint, that prior to and at the time of the enactment of said statute, Complainants had on hand in their stocks of merchandise, large quantities of such goods and articles which are sold and delivered with said coupons, etc., and that the same was true at the time said statute took effect, and is so at the present time, and if Complainants shall be prevented from selling such articles of merchandise with such coupons, etc., they will be subjected to great loss and damage, and much hindered, embarrassed and injured in their business, and the value of their said property

on hand as aforesaid will be destroyed or greatly lessened. See printed Bill of Complaint, paragraph 5, page 18.

For this reason also, said provisions of said act are unconstitutional. The proposition, we submit, is sustained by many of the cases heretofore cited.

People vs. Van DeCarr, New York Court of Appeals, 1904, 70 N. E., 965.

People vs. Zimmerman, 92 N. Y. Sup., 503.

SAID LICENSE TAXES UPON THE FACE THEREOF ARE SO EXORBITANT, ONEROUS AND UNREASONABLE, AS TO BE MANIFESTLY PROHIBITORY AND VOID.

The objection mentioned in the above heading is more particularly set forth in subdivisions (G), (H) and (I) of paragraph XIV, pages 28 and 29 of the printed bill, and we submit it sustained by the authorities.

Postal Teleg.-Cable Co. vs. Taylor, 192 U. S., 64; 48 L. Ed., 342.

Humes vs. Little Rock, 138 Fed., 929.

Ex-Parte Hutchinson, 137 Fed., 949.

Ex-Parte Hutchinson, 137 Fed., 950.

SAID PROVISIONS OF SAID STATUTE ARE CONTRARY TO THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AGAINST IMPAIRING THE OBLIGATION OF CONTRACTS.

The Bill of Complaint alleges and shows that in addition to dealing in coupon or insert goods which are shipped into Florida by persons from without the State of Florida, that divers of Complainants and other persons in like situation have delivered to their customers coupons, certificates, cash register slips or the like redeemable by such Florida merchants, issuing and delivering same upon the understanding that such Complainants should continue to sell to such customers such articles and deliver therewith such coupons, slips or the like so that such customers should be able to accumulate sufficient

numbers thereof so as to have the same paid or redeemed, as in the bill mentioned.

See paragraphs IV, V, VIII and IX of the Bill of Complaint, Record 10, 11, 12.

Said provisions of said statute complained of prevent Complainants and other persons in like situation from completing and performing said arrangement and understanding with their said customers, as is more fully stated in paragraph VIII of said Bill of Complaint. Complainants submit, therefore, that said provisions of said statute are unconstitutional, being contrary to and in violation of the provisions of clause one (1) of Section ten (10) of Article one (1) of the Constitution of the United States, as stated in paragraph XV of the Bill of Complaint.

Humes vs. City of Little Rock, 138 Fed., 929.
Ex-Parte Drexel, 147 California, 763.
Collins vs. New Hampshire, 171 U. S., 30, 33.

IN ITS VIRTUAL PROHIBITION OF TOBACCO INSERT COUPONS, CERTIFICATES OR THE LIKE THE FLORIDA STATUTE IS CONTRARY TO THE STATUTES OF THE UNITED STATES WHICH AUTHORIZE SUCH INSERTIONS.

See paragraph XVI of the Bill of Complaint.

"United States Revised Statutes, Sec. 3394, as amended by Section 10 of Act of July 24th, 1897, as further amended by Section 2 of Act of July 1st, 1902."
McDermott vs. Wisconsin, 228 U. S., 115.
Bettman vs. Warwick, 108 Fed., 50.
McCulloch vs. Maryland, 4 Wheat., 436.

Appellees respectfully submit that for all the reasons and upon all the ground hereinbefore stated and those set up in the Bill of Complaint, that there was no error in the proceed-

ings and the orders of the Court below and that the same should be affirmed.

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